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Partidas

THE SOUTH CAROLINA

WHICH HAVE BEEN IN FORCE SINCE

BY THE

THE SOUTH CAROLINA
THE SOUTH CAROLINA
THE SOUTH CAROLINA

VOL. II

NEW ORLEANS

THE SOUTH CAROLINA

THE SOUTH CAROLINA

THE LAWS
OF
LAS SIETE PARTIDAS,
WHICH ARE STILL IN FORCE IN THE STATE
OF LOUISIANA.

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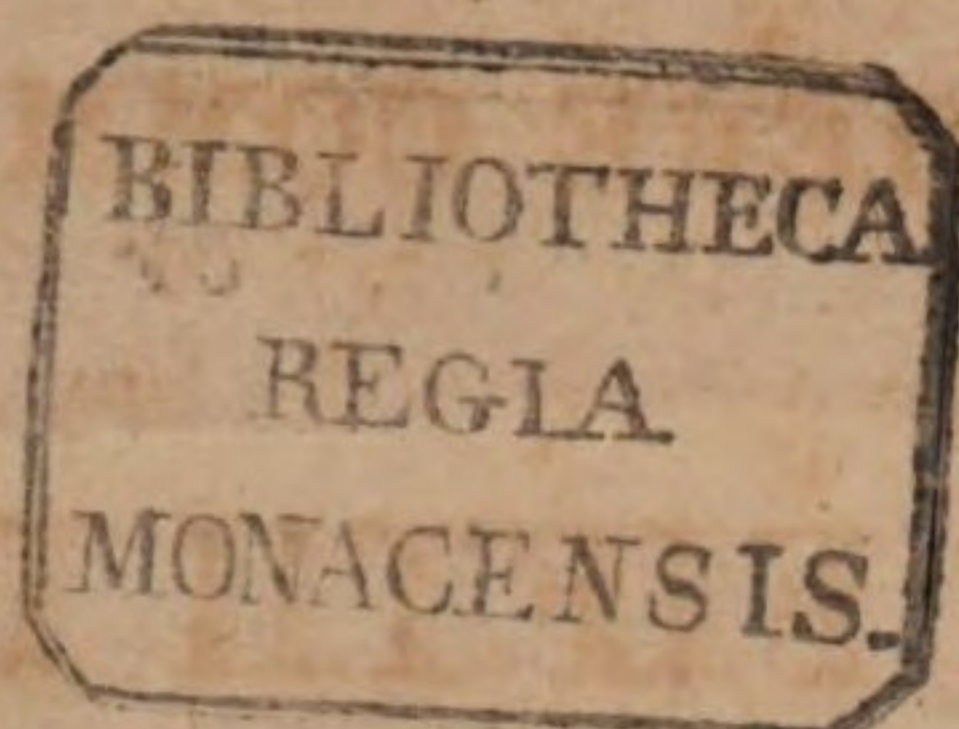
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L. MOREAU LISLET AND HENRY CARLETON.
COUNSELLORS AT LAW.

VOL. II.

NEW ORLEANS :

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HERE COMMENCES

THE FIFTH PARTIDA,

WHICH TREATS

OF LOANS, SALES, PURCHASES AND EXCHANGE,
AND OF ALL OTHER CONTRACTS AND AGREEMENTS OF WHATEVER NATURE THEY MAY BE,
WHICH MEN ENTER INTO WITH ONE ANOTHER.

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
Loans.

Digest lib. 12. tit. 1. - - - - *De rebus creditis si certum
petatur et de condictione.*

Novell. coll. 6. tit. 2. - - - - *De instrumentorum cautela
et fide et primum de de-
posito et mutuo, &c.*

Domat's Civil Law, part 1. book 1. tit. 6.

Fuero Real, book 3. tit. 16.

Civil Code, book 3. tit. 10 chap. 2.

OF LOANS.

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TITLE I.

Which speaks of Loans.

LAW 1.

What a loan is ; what advantages arise from it ; how many kinds there are, and of what things it may be made.

Loan is a species of contract entered into between men by which they lend to one another, their things respectively, when they stand in need of them. From loans very great advantage arises : for men by means of them, make use of the things of each other, as of their own ; which often gives rise to, and increases, their friendship. There are two kinds of loans ; the one more natural than the other : as where a man loans another, any of those things which are usually counted, weighed, or measured. This loan is called in Latin, *mutuum*, which means in common speech, a loan made at the request of the borrower : for, by a loan of any of these things, the property will pass to the borrower. The other sort of loan is that which is made of any thing not of the kind above mentioned : as of a horse or other beast ; of a book, or other similar things. This loan is called in Latin, *commodatum*, which means a thing lent by one man to another, to use and profit by, but not to acquire the property therein. We shall treat of each of these loans in the laws of this title, beginning with that called in Latin *mutuum*. (1)

(1) C. art. 1, p. 402---ibid art. 18, et. 20, p. 404.

LAW 2.

Who can lend, to whom, and what things can be lent.

Every one may lend to another, any of those things which we said in the preceding law, can be either counted, weighed, or measured. This is understood where the things belong to the lender, or if to another person, then where he lends under such other person's orders. We likewise say, that immediately the thing lent passes into the power of the borrower, he may do with it, what he pleases, in the same manner as with his own. But he will be bound to restore to the lender, as much as he had received from him, in things of the same kind, quality and goodness, notwithstanding the lender had not expressly stipulated any thing to that effect: and he ought to restore them at the time agreed upon between the parties, when the loan was made; and if no time had been agreed upon, then the things must be restored at the will of the lender, after the lapse of ten days from the date of the loan. (1)

LAW 3.

That loans may be made to churches, to the king, corporations, and minors under age.

Not only may one man lend to another, the things which, in the preceding law, we said could be lent; but he may likewise lend them to the king, to the churches, cities and towns, as also to minors under twenty-five years of age. But a loan made to a church, or to a person employed any where as the king's mes-

(1) *C. art.* 18, 19, 25 & 28, *p.* 404 & 406.

senger, (*Mensajero del Rey*) who receives it in the king's name; or that which is made to a minor under twenty-five years of age, can not be demanded, nor obtained by the lender, unless he can prove it turned to the profit of the king, church, or minor. Yet if such messenger should obtain the loan, in virtue of a writing granted to him by the king, to enable him to obtain it: then the king will be obliged to restore the loan so made, whether it turned to his profit or not. And as doubts may arise as to the manner of proving whether the thing lent had turned to the profit of him in whose name it was made: we say that if the person who made the loan to the church, or to any one who received it in the name of the king, or to any city or town, or to a man under age, can prove, that at the time of the loan, the borrowers were pressed and in great want of it, and that it turned to their profit; such proof as this will enable the lender to recover the thing loaned. (1)

LAW 4.

Of loans made to sons under the power of their fathers or grand-fathers.

If during the time the son or grand-son is under the power of his father or grand-father, he borrow any thing of another, without the order of the person under whose power he is; then neither the son nor the father will be bound to return the loan; nor the security of the son, if he had given any. But if the son himself

(1) R. l. 22, tit. 12, b. 5.

should restore the thing he had borrowed, or replace it with another thing of the kind, which was not out of the estate of his father, or grand-father; what he so does, will be valid, and his father cannot hinder him. We likewise say, that if the son or grand-son, being under the power of his father or grand-father, should be interrogated at the time of the loan, whether or not he was under the power of his father or grand-father, or some other ascendant, and he deny it, saying that he was not; he will be obliged, on account of such deception, to pay for what he had borrowed. So we say it would be, with respect to any one who publicly holds any office of the king, or of any other lord, or of any council: or who exercises any trade publicly as an artisan; or who keeps an exchange office, or a store of clothes, or of other merchandise in which he is accustomed to labour or trade, as a person not under the power of another: because men believe, that he who is acting for himself, is bound to pay what he borrows, notwithstanding he should be under the power of another. So we say, that when the person in the power of another, is a military man, and he borrows any thing, he will be obliged to return it. And this because it ought not to be presumed that the borrower had made a bad use of the loan, but that he employed it in things appertaining to the profession of arms. (1)

LAW 5.

Of the loan which a minor under age makes to another person:

If a minor under twenty five years of age, lend any

(1) *R. l. 4, tit. 7, b. 1—ibid l. 22, tit. 11, b. 5.*

thing to another minor, and the borrower convert it to his own benefit, or preserve it, he will be obliged to return it to the lender. But if the borrower were above twenty five years of age, he will be obliged at any rate, to restore it, whether he had converted it to his benefit, or had preserved it or not. Likewise, when any one under the power of another, employs the loan he had obtained, to the benefit of him under whose power he is: as for the purpose of marrying one of his sisters, or to feed and clothe himself, or for any other purpose necessary to the family which the person under whose power he was, is bound to support and maintain: we say that a loan of this nature, must be restored either by the borrower, or the person under whose power he is. (1)

LAW 6.

Of a loan made to a son or grand-son who is under the power of his father or grand-father, with the consent of the person under whose power he is.

If he who is under the power of another, borrow any thing, with the knowledge, or by the command of the person under whose power he is; or if such person be present, or consent to it; or if he had borrowed it elsewhere, under the instructions of such person, whether by letter or otherwise; or if such person ratify the loan, or afterwards pay a part of the debt; we say that both he who obtained the loan and he under whose power he is, will be bound to restore it. We likewise say, that if any one borrow any thing, while he

(1) *R. l. 22. tit. 11. b. 5.*

is under the power of another ; and after he comes of age and ceases to be under the power of the person who had the care of him, he should pay a part of the debt, he will be then bound to pay all that remained due. We likewise say, that if any one under the power of another, go on a mission, or to the public school, and while he is there, borrows any thing, both he and the person under whose power he is, will be bound to pay for it, at least for as much as the borrower would have consumed for his food, clothing and other things which would have been necessary for him, had he remained under the power and in the house of the other. And so it would be with respect to the amount that might be deemed necessary for the rent of his house, the salary due his instructor, and for other things that he necessarily expends on account of his studies or of the mission on which he was sent. (1)

LAW 7.

Of a loan made to one who keeps an exchange office, or a store for another person.

If a money broker, or merchant, keep a store of clothes or other merchandize, and confide it to another person not under his power, to keep it in his place: if such person borrow any thing, by the order of him who placed him there, or without his order, but converts it to the profit of the latter; then he who placed him there, will be bound to pay for the loan, and not the borrower. But if such person had not taken the loan by the order of him who placed him there, nor

(1) R. l. 4, tit. 7, b. 1---l. 22, tit. 11, b. 5---l. 2, tit. 16, b. 5.

had converted it to his profit, then the borrower himself will be bound to pay for the loan. (1)

LAW 8.

When the thing loaned ought to be returned, and in what place.

If one man lend another, any of those things that can be counted, weighed, or measured, designating a day or place, on or at which the loan is to be returned; the borrower will be bound to return it, at the time and on the day agreed upon. And if it happen that he cannot procure a sufficiency of the same kind of things with which to return the loan, he ought to pay the lender a price equal to the value of the things lent. And the price must be fixed according to the value which a thing of the same kind, had at the time and in the place, where and when it was agreed it should be restored. But if no place or time had been agreed upon for the restitution of the loan, the price ought to be fixed and estimated according to the value of the thing, in the place where it was claimed, and at the time judicial demand thereof was made. (2)

LAW 9.

How he who has acknowledged that he had received a thing on loan, may defend himself when sued therefor, in case the thing had not been delivered to him.

It sometimes happens that when one man promises to lend a thing to another, the latter confides in the

(1) R. l. 16, tit. 11, b. 5.

(2) R. l. 2, tit. 16, b. 5---ibid l. 1, tit. 3, b. 4.

promise and gives his written acknowledgement that the thing had been delivered to him, when in truth it had not been ; and afterwards a suit is instituted against him on that account, as if the loan had been truly made to him. When this happens, we say, that the person who gave the writing, ought to complain to the king, or those who administer justice in his place, that the person who had promised to lend him so many maravedis, refuses to count or to deliver them to him, and that he prays that the writing by which he had acknowledged the receipt of the promised loan, might be restored to him. And if the borrower be silent and does not complain until after two years have elapsed from the time he gave the writing, he cannot do it afterwards : and if he be afterwards sued in that respect, he will be obliged to pay the maravedis, in the same manner as if he had received them. And if on the contrary, he makes complaint within the two years as above said, he will not be obliged to comply with the writing, nor pay the money ; unless the person to whom he gave the writing, can prove that he had counted and paid the maravedis which he had promised to lend : or unless the debtor who had acknowledged that he had received the money as a loan, had renounced the exception of *non numeratae pecunie* : for then he cannot avail himself of such means, if the renunciation be expressed in the writing. (1)

(1) R, l. 2, tit. 16, b. 2---l. 1, tit. 5, b. 4.

LAW 10.

What is the effect of a loan, and what penalty he incurs who does not return it.

Such is the force of a loan of things that can be counted, weighed, or measured, that as soon as the thing loaned passes under the power of the person to whom it is loaned, though it should be then burnt, or carried off by water, or stolen by thieves, or lost, in any other manner whatever, the loss will be on account of the borrower, and not the lender : we likewise say, that if the borrower should not restore the loan, at the time he ought, he will be bound to pay the penalty in which he had obligated himself in that respect. And if no penalty had been stipulated, he ought to pay for the loss and damage the lender sustained in claiming the thing lent; and for the payment thereof, the heirs of the lender will be obliged in the same manner as he was himself. (1)



TITLES,

Of the Roman and Spanish Laws, and of the Civil Code which relate to the title of LAS SIETE PARTIDAS, on the loan called in Latin *commodatum*.

Digest lib. 13, tit. 6. - - - - - *Commodati vel contra.*

Code lib. 4, tit. 23. - - - - - *De commodato.*

(1) C. art. 19 and 30, p. 404 and 406,

Domat's Civil Law, part 1, b. 1, tit. 5.

Civil Code, book 3, tit. 10, chap. 1.

OF THE LOAN CALLED IN LATIN *COMMODATUM*.

What is meant by the loan called in Latin <i>commodatum</i> ; who can contract it; to whom and of what things, - - - - -	LAW 1
In what manner the loan called in Latin <i>commodatum</i> is made; at whose risk is the thing lent, if it should die, be lost, or deteriorated, - - - - -	2
For whom is the risk of the thing loaned when it is lost by accident, - - - - -	3
If he who takes a thing on a loan, sends it by a messenger, and it get lost on the way, who ought to sustain the loss, - - - - -	4
The heirs of the person deceased ought to return the thing borrowed by the person of whom they inherit, - - - - -	5
That whosoever lends a thing with any defect, ought to make it known to the borrower, - - -	6
That a man who borrows a horse or slave ought to feed it, as long as he retains it, - - - - -	7
That he who loses the thing borrowed and pays the owner for it, will be entitled to it, if he afterwards find it, - - - - -	8
At what time the borrower ought to return the thing borrowed, and what penalty he incurs if he fails therein, - - - - -	9

TITLE II.

Of the loan called in Latin Commodatum. (a)

LAW 1.

What is meant by the loan called in Latin commodatum; why it is so called; who can contract it; to whom, and of what things.

Commodatum is a species of loan which men make to one another, as of a horse, or other like thing, in order that the lender may make use of it, for a certain time. It is understood to be made through good will and affection, the lender requiring no price as for a hiring, nor any other recompence whatever. *Commodatum* signifies as it were, a thing that is given for the benefit of him who receives it. And all those who we said in the preceding law, could make or receive a loan of things usually counted, weighed, or measured, can likewise make the second species of loan of which we here speak. (1)

LAW 2.

In what manner the loan called in Latin commodatum is made; at whose risk is the thing lent, if it should die, be lost, or deteriorated.

The ancient sages have informed us, that the *commodatum* can be made in three ways. The first is

(a) The loan called *commodatum* may be translated a loan for use, and the loan called *mutuum* may be translated a loan for consumption.

(1) C. art. 1, p. 402.

where the lender lends the things solely with the intention of rendering a favor to him who receives it, and not for his own benefit ; as where one man lends to another a horse, arms, or any similar thing that the borrower wants. And we say that the borrower is bound to take the same care of such a loan, as if the thing belonged to himself, and even more if he can. And if he does not, and the thing be lost, or die, or deteriorated, through his fault or neglect, he will be obliged to return another such thing equally good, with that which had been lent him. But if the loss happen by accident and not through his fault, then he will not be bound to pay therefor. The second is where the thing lent profits the lender as well as the borrower : as where two men, by common consent, invite one of their friends to eat with them ; and one of them, wishing to please and honor their guest, and having no silver vases to drink out of, borrows them of the other ; we say that the borrower will not be bound to take better care of such and other like loans, than he is of things belonging to himself. And therefore if he take the same care of them, as he does of his own, and they get lost on account of his natural carelessness (*for ser el de mal recabdo*), he will not be bound to pay for them. The third is where the lender makes the loan, more with the intention to honor and please himself, than to serve the borrower. As when a man lends to the woman betrothed to him, or to his wife (*muger*), any precious garments, that she might appear before him with beauty and splendor : wherefore we say, that if she lose them, she will not be bound to pay for them,

as the lender intended only to satisfy and please himself; unless she lose them through her own fraud. And what we say in this law, takes place, not only with respect to the things above mentioned, but with respect to all other similar things. (1)

LAW 3.

For whom is the risk of the thing loaned, when it is lost by accident.

If the borrower lose by accident (*occasion*) the thing loaned to him, when it is not of those things which are usually counted, weighed, or measured, but such as a horse, or arms, or cloth, or other similar thing; he will not be bound to pay for it, if it be lost, without his fault. And it would be lost by accident, and without his fault, if it should be burnt by fire with other things, or if the house in which it is, fall upon it and destroy it: or if it be carried off by an inundation of waters, or be taken by the enemy, or stolen by thieves: or if it be lost in a tempest at sea, or by the wrecking of the ship in which it was carried, or in any other similar way. Yet there are cases where, notwithstanding the thing should be lost by any of the above mentioned accidents, still the borrower would be obliged to pay for it. Such would be the case when a man borrows silver vases to use in his house, and carries them to sea, or upon the high road where they get lost: or where he borrows a beast for a day's journey, and conveys it to a greater

(1) *C. art. 8. p. 402.*

distance where it gets lost or dies. In these and other like cases, the borrower, will be obliged to pay for the thing loaned, though it should be lost by accident : for he went in the way of the accident, by using the thing, in a manner different from what he ought to have done. We likewise say, that where a man borrows from another, for a certain time, any one of those things, not usually counted, weighed, or measured, and obligates himself to return it to the owner, on a certain day, or hour ; if he continue to use the thing, after such time, retaining it contrary to the owner's wish, and it die or get lost, he will be bound to pay for it. And so it would be, if the borrower, on receiving the thing lent, should take it, at his peril, in case it should die, get lost, or be deteriorated. (1)

LAW 4.

If he who takes a thing on a loan, sends it by a messenger and it get lost on the way, who ought to sustain the loss.

If a man borrow any of those things not usually counted, weighed or measured, and send it to the owner by a person worthy of trust (*de recabdo*), one to whom such things had been usually confided, or other things of greater value ; if the carrier lose it, on the way, by accident (*occasion*) ; as if it be taken from him, by force, or be stolen from him, or taken in any other similar way ; or if any fraud be practised upon him, by which he loses it : we say that in each of these and other similar cases ; the loss will be, on account of the

(1) *C. art. 9. p. 402.*

lender and not the borrower : for as the latter had taken the same care in sending it, that he would have done, had it been his own, he will not be bound to pay for it. But if he send it by a person not trust worthy, (*que non fuesse de buen recabdo,*) and one to whom he had not usually entrusted with such things ; if then it should be lost, through the negligence, or fault of such person, the borrower will be bound to pay for it. But if the lender send a person to bring it, and the borrower deliver it to the messenger, and he loses or ill treats it, or runs away with it, the owner must sustain the loss, and not the borrower. Yet if a man lend a thing of which he is the owner, and then sends word to the borrower, to send it back to him by a trusty person ; and the messenger change the message and say that it must be sent by himself : if the borrower give credit to the message and deliver the thing to the messenger who loses it, or runs away with it ; the loss will be on account of the borrower.

LAW 5.

The heirs of a person deceased ought to return the thing borrowed by the person of whom they inherit.

If a man die who had borrowed a horse, or other like thing, his heir will be bound to return it to the lender. And if there happen to be many heirs, he among them, who has the thing, is bound to return it to the owner, or to his heirs. We likewise say, that if the borrower, during his life, or his heirs after his death, lose the thing lent, through their fault ; each of the heirs will be obliged to pay his portion of the value

of the thing ; or else to buy another such thing equally good, and give it to the owner of the other that had been lost. And we also say, that if a thing be lent to two or more persons, without each of them *obligating* himself *in solido*, at the time of the loan, for its entire restitution ; if then the thing should get lost, each of them will be bound to pay his part of its value, and no more. (1)

LAW 6.

That whoever lends a thing with any defect, ought to make it known to the borrower.

If a man ask a slave on a loan, to serve him for any length of time, and the slave should be a thief and his master be silent as to that fact, and does not make it known to the borrower : if the slave steal any thing from the borrower, the lender will be bound to pay therefor. We likewise say, that if one man lend another a tub or earthen jar, or other thing to put wine or oil in ; and the vessel be cracked, or such as to give the wine or oil that is put in it, a bad flavour ; or such as to spoil or damage it, in any other way : if the owner knew of the defect, and remained silent, without making it known to the borrower ; then the lender will be bound to pay for all the damage caused by the thing lent. (2)

(1). *R. l. 5. tit. 6. B. 5.---C. art 7 p. 402.*

(2) *C, art. 24, p. 406.*

LAW 7.

That a man who borrows a horse or slave, ought to feed it, as long as he retains it.

If a man borrow a horse, slave or other similar thing, he is bound, while he uses it, to feed it, and provide it, with all other things it stands in need of, at his own costs. But if the thing borrowed fall sick, without the fault of the borrower, then the owner, and not the borrower, will be bound to pay for every thing necessary for the cure of the infirmity, as also for the medicine and the cure and charges of the physician.

LAW 8.

That he who loses the thing borrowed and pays the owner for it, will be entitled to it, if he afterwards find it,

When a man has lost the thing lent, and paid the owner therefor, and the owner afterwards find it ; it will be at the option of the latter, either to keep it and return the price he had received of the borrower, or to keep the price and return the thing. And if any other person than the owner, happen to find it, he who lost it, may demand it, in the same manner, as if it were his own, in as much as he had paid its price to the owner.

LAW 9.

At what time the borrower ought to return the thing borrowed ; and what penalty he incurs, if he fails therein.

If a man borrow a horse, or other like thing, for a certain service, or for a certain time ; we say, that he is bound to return it, as soon as the service is render-

ed, or the time is elapsed : nor can he retain it afterwards, as a pledge, for any debt, or thing due to him from the lender ; unless the debt had been contracted for the benefit, or on account of the thing lent, and that too, after the thing was loaned and not before : for if any such debt exists, the borrower may retain the thing until he be reimbursed what he had expended, on its account, provided the expenses be such as may be lawfully demanded. And the penalty incurred by those who do not return the thing lent, is this, that they shall pay all the expenses it cost the lender, in suing for it. And moreover, if the thing should be lost, destroyed, or deteriorated, after issue joined in the cause, the risk will be on account of the borrower. (1)

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
Deposits.

Digest lib. 16, tit. 3, - - - - *Depositi vel Contra.*

Code lib. 4, tit. 34, - - - - - *Depositi vel Contra.*

Novell. coll. 6, tit. 17, - - - *De Deposito, &c.*

Novell. coll. 6, tit. 2, - - - - *De instrumentorum cautela
et fide et primum de De-
posito, &c.*

(1) *R. l. 1, tit. 7, B. 5.---C. art. 13 and 17, p. 404.*

Domat's Civil law, part 1, b. 1, tit. 7.

Fuero Juzgo, b. 5, tit. 5.

Fuero Real, b. 3, tit. 15.

Civil Code, b. 3, tit. 11.

OF DEPOSITS CALLED IN LATIN *DEPOSITUM*.

What a deposit is, which in Latin is called <i>Depositum</i> ; whence it takes its name, and how many kinds there are, - - - - -	LAW 1
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Who may give things in deposit, and to whom, -	3
That if the depositary lose by accident, the thing he has in deposit, he will not be bound to pay for it, except in certain cases, - - - - -	4
Who may demand the thing given in deposit, and when, and to whom it ought to be returned, and in what manner, - - - - -	5
In what cases the depositary is not bound to return the thing to him who gave it in deposit, -	6
That the deposit which is made in a church, or in any religious place, is to be restored, - - - - -	7
How the deposit is to be restored, when it is made in a time of disaster, or otherwise; and what penalty the depositary deserves when he denies the deposit and it is proved upon him, -	8
That a deposit received by the deceased, during his life, ought to be restored in preference to all other debts; except in certain cases, - - - - -	9
That the expenses incurred on account of the deposit, ought to be restored to him who had incurred them, - - - - -	10

TITLE III.

Of the deposit called in Latin Depositum

LAW 1.

What a deposit is, which in Latin is called depositum; whence it take its name, and how many kinds there are.

Deposit, which in latin is called *depositum*, is when one man gives any thing to another, in whom he has confidence, to keep it for him. It takes its name from *peño*, which means as it were, to put out of the hand into the care of another, that which one wishes to deposit. There are three sorts of deposit. The first is where a man, without any necessity compelling him thereto, put his things under the care of another person. The second is, when he makes the deposit in time of necessity: as if the house in which a man had any thing, should fall; or if the vessel in which he conveyed it, should be wrecked, or if in case of any other necessity, he should, at that time, put it under the care of another person, to preserve it from danger. The third is, where any persons are contending for a thing and they put it into the hands of a guardian (*fiel*) to keep it until the dispute be decided by a judgment: (1) (a)

(1) C. art. 2, 29 and 36, p. 410 and 416.

(a) See Partida 3, title 9.

LAW 2.

What are the things that can be deposited.

Any thing whatever may be put into keeping or deposit. But properly speaking, moveable things are more usually put in deposit than any others. We likewise say that a man takes things in deposit, when he receives no price or reward for keeping them. For if he take a reward, or is promised one ; then it will not be a deposit, but a hiring, since he takes a price for keeping it ; and therefore he would be bound to take better care of what was entrusted to him, than he would otherwise be. We likewise say that neither the property or possession of the thing put in deposit, is transferred to the person who receives it ; unless it be of those things that can be counted, weighed or measured, and which are actually received by count, weight or measure ; for then the property will pass to him. But he will be bound to restore the same thing, or as much more, and of the same kind of that which he had received. (1)

LAW 3.

Who may give things in deposit, and to whom.

A man may give in keeping or deposit, any thing he has in his power, to any one whatever, whether he be a clergyman, or layman ; to one of a religious or secular order ; to a free man or to a slave. But he who receives the thing, will be bound to take good and

(1) *R. l. 15, tit. 18 B. 5—C. art. 4 and 11, p. 410 and 412.*

faithful care of it, so that it neither get lost, or be deteriorated, through his fault or fraud. And we say that it would be lost, through his fault, when he does not take care of it, in the same manner that the generality of mankind are accustomed to take care of their own things. But if the thing should be lost, through a slight fault of the person who had it in keeping, he would not be obliged to pay for it, except in three cases. The first is when the depositary obligated himself, at the time he received the thing, to pay for it, if it should be lost by such slight fault. The second is, where the depositary himself, without any solicitation from the owner, asks and requests that the thing may be entrusted to him. And the third is where he receives a price, for taking care of the thing given him in deposit. And if the thing given in deposit, in any of these three ways, be lost, or deteriorated, through the neglect, or bad keeping of the depositary, he will be bound to pay for it. And we say that a thing is lost, through a slight fault, when he who has it in keeping, does not bestow upon it, that care and attention which every careful and sensible man ought to bestow.

(1)

LAW 4.

That if the depositary lose by accident (occasion) the thing he has in deposit, he will not be bound to pay for it, except in certain cases.

The thing which the depositary has in his keeping is sometimes lost, or deteriorated by accident : as

(1) C. art. 11, p. 412.

where it dies naturally, or is killed by another person, or stolen by robbers, without the fault of the depositary. In any of these or similar cases, he will not be bound to pay for it, unless under four circumstances. The first is where the depositary, at the time he received the thing in deposit, obligated himself to pay for it, in whatever way it might be lost. The second is where the depositary is not willing to return the thing to the owner, when he has it in his power to do so. For if it die after it had been judicially demanded and the suit commenced by petition and answer, the depositary will be bound to pay for it. The third is, where the accident by which the thing in deposit, is lost or dies, is caused by the fault or fraud of the depositary. The fourth is, where the thing is put in deposit principally for the advantage of him who receives, and not of him who gave it.—In any of these cases, notwithstanding the thing given in deposit should be lost, or die, or deteriorated by accident, yet the depositary will be responsible for it to the person who gave it in deposit, or put it under his care, or to his heirs. (1)

LAW 5.

Who may demand the thing given in deposit, and when, and to whom it ought to be returned, and in what manner.

The depositary and his heirs are bound to return the thing he receives in deposit to him from whom he received it, or to his heirs, as soon as it is demanded. And although something may be due to the depositary

(1) C. art. 15, p. 412.

from him who put the thing in deposit, yet he cannot, on that account, retain the thing as a pledge by way of what is called *compensatio* in latin, which means as it were, deducting one debt from another ; but he ought, on the contrary, to deliver the thing up, after which he may claim what was due to him. But if the thing delivered to any one in deposit, should be in dispute between two or more persons ; or if they had delivered it to him as a sequestrator (*en fieltad*) ; then he would not be bound to deliver it to either of them, until the dispute had been decided by a judgement, or the parties had settled it amicably : for then he ought to return it according to the agreement made, at the time he received it, or accordingly as the parties shall agree among themselves. And the thing put in deposit, must be restored, with all its fruits, rents and ameliorations. (1)

LAW 6.

In what cases the depositary is not bound to return the thing to him who gave it in deposit.

There are four reasons for each of which the depositary is not bound to restore the thing given to him in deposit, either to the person who gave it, or to his heirs. The first is where the thing given in deposit, is a sword, or knife or any other species of arms with which men usually wound or kill. For if the person who made the deposit, should happen afterwards to become mad, the depositary ought not to return it to him, during his madness, lest he do mischief with it.

(1) C. art. 18 and 19, p. 414.

The second is where the person making the deposit, is banished for some crime he had committed, for which the king had commanded all his goods to be seized; for then every thing he had put in deposit, before he committed the offense, will belong to the king and not to the heirs of the exile. The third is where a thief puts in deposit, a thing which he had stolen, and when he demands it, the person from whom it was stolen, comes at the same moment, and tells the depositary not to deliver it up, as he wished to prove that the thing belonged to him, and had been stolen from him: then the depositary ought not to restore it, until it can be proved whether what such person told him, be true or not; and if it is not proved, then the depositary ought to deliver it to him who gave it in deposit. The fourth is where one man gives to another a thing to keep, which had been stolen from the latter: then the depositary, if he recognises and proves the thing to be his, will not be bound to return it. (1)

LAW 7.

How the deposit which is made in a church, or other religious place, is to be returned.

If a man deposit a thing in a church, or monastery, with the consent or by the command of the prelate or chaptry of such church; they will be bound to return it to him who put it in their keeping, in the same manner, as any other person who had received it in deposit. And so it would be where the deposit is made in the presence of the prelate or chaptry, they

(1) C. art. 20, §. 414.

being silent and making no opposition, notwithstanding it be done without their command or consent. But if the deposit be left in the care of one of the members of the church or chapter only, then that one alone would be bound to return it, and not the prelate or chaptry : unless it can be proved that the thing had been given, or expended for the benefit of the church ; for in that case, they will all be bound to restore it.

LAW 8.

How the deposit is to be restored, when it is made in a time of peril, or otherwise ; and what penalty, the depositary incurs, when he denies the deposit and it be proved upon him.

If a man be overtaken by any heavy disaster ; as where his house in which his goods are, is in danger of being burnt ; or where his property is exposed to being carried off by an inundation of waters ; or where it is on board of a vessel which is in danger of being lost ; and if for these or any similar reason, he give any thing which he feared could be lost, to another to keep : if the depositary afterwards deny the deposit when it is demanded of him, and it be proved upon him, he ought to pay double its value : and this because he commits a great fault in denying a deposit made with him, at a time when the person making it, was distressed in the manner above mentioned, and had it not in his power to learn whether the depositary were worthy of trust or not. But if the depositary deny that he had received the deposit made with him, in any of the ways mentioned in the second law of this title, and it should be proved upon him, he will then

be degraded and become infamous, and must moreover restore the deposit, or its estimated value, together with all the costs, damages and losses which the person making the deposit had experienced on that account; for the amount of which, the latter ought to be believed under oath: yet the judge ought to tax and moderate them, always having a regard to the character of the person who swears to their amount. And these damages, we say, are understood to be those which arise from the delay to return the thing when demanded, and not the benefit which might have been gained from the thing; as where the person making the deposit was bound to pay a sum of money, or other thing, on a determinate day, under a penalty or forfeiture, or in any other similar way, and had accordingly incurred the penalty or forfeiture because the depositary had failed to restore the thing, at the time it ought to have been restored. And if the thing deposited be of a nature to bring fruits of itself, the depositary will be moreover bound to restore all the fruits he had gathered from it, while it was in his keeping, as well as those he might have gathered from it, after it had been demanded by the owner or his heirs.

LAW 9.

That a deposit received by the deceased, during his life, ought to be restored in preference to all other debts, except in certain cases.

Where a man receives in deposit, ready money, or other pieces of gold or silver coin, or any of those things which usually are, and can be counted, weigh-

ed or measured, and dies before he had returned them ; the things thus deposited will enjoy a privilege and must be first returned and paid for, before any other debt due from the deceased : unless however the deceased had contracted some debt, before he had received the thing in deposit, for which he had expressly obligated a part, or the whole of his estate ; for then such debt must be first paid before the thing given in deposit is returned. (1) And so it would be if the debt had been contracted on account of the burial of the deceased ; or for money lent to the depositary, to repair a house, ship, or other similar thing exposed to be lost, unless such repairs had been made ; or where the deceased owed any thing to his wife which she had given him in dowry ; or where he had made a contract with the king, by which he had obligated his estate, or had committed a crime for which he had something to pay : such debts as these ought to be paid, before the deposit is returned. But with respect to other things given in deposit, not by count, weight, or measure ; if they be still found among the effects of the deceased, and can be proved to be the same that had been put in his keeping ; they ought, in every case, to be delivered to the owner, or his heirs, before the other debts are paid, of whatever nature they may be.

(1) Febrero, in speaking of the privileges granted to certain creditors in case of insolvency of the debtor, says that there is a privilege in favour of him who has made a deposit in the hands of the debtor, provided the fact appears by an instrument executed before a notary public and witnesses, and not by the mere confession of the debtor. Febrero adicionado 2d part, book 3, chap. 3, sec. 2, no. 198.

LAW 10.

What expenses made on account of the deposit, ought to be repaid to the person who expended them.

Although a man ought to recover the expenses he had incurred, on account of the thing he had in deposit, nevertheless he cannot retain the thing, as a pledge therefor, but must on the contrary return it to the owner, when he demands it. Yet we say, that the owner will be bound to reimburse the expenses incurred in that way. We likewise say, that if a man puts a slave whom he knows to be a thief, under the keeping of another person, and does not inform such person of it, and the slave steal any thing from his keeper; the owner will be bound to pay for the thing stolen. But if he who put him under the care of another, did not know that the slave was a thief, then he will have the choice, either to pay for the thing stolen, or to abandon the slave, as a compensation for the theft. (1)



TITLES,

Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on Donations.

Digest lib. 39, tit. 5. - - - - - *De Donationibus.*

Digest lib. 39, tit. 6. - - - - - *De mortis causa Donationibus.*

(1) C. art. 28, p. 414.

Institutes lib. 2, tit. 7, - - - - *De Donationibus.*

Code lib. 8, tit. 54, 55, 56,

and 57 - - - - - *De Donationibus.*

Novell coll. 9, tit. 45, chap. 1, *De Donationibus, &c.*

Const. 50, - - - - - *Ut Donationes quae in litteras relatae non sunt ad Quingentos usque aureas valeant.*

Domat's Civil Law, part 1, b. 1, tit. 10, and b. 1. tit. 1.

Fuero Juzgo, book 5, tit. 2 and 3.

Fuero Real, book 3, tit. 12.

Leyes del Estilo, ll. 34, 208, 212, 234.

Ordenamiento real, book 5, tit. 9.

Recopilacion de Castilla, book 5, tit. 10.

Autos Accordados, book 5, tit. 10.

Civil Code, book 3, tit. 2.

OF DONATIONS.

What a donation is, who can make it, to whom, and of what things, - - - - -	LAW 1
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TITLE IV.

Of Donations.

LAW 1.

What a donation is, who can make it, to whom, and of what things.

A donation when made, without restraint, is a favour springing from the nobleness and generosity of the heart. And every freeman of twenty-five years of age, may give the whole, or a part of his estate, to whomsoever he pleases, although he may not know the donee ; provided only, that the donee be not one of those whom the laws of this our book, prohibit from receiving donations. But if the donor be a mad man or lunatic, or a prodigal whom the judge of the place had interdicted the use of his estate, no donation by such persons, would be valid, though all donations made to them would be (1).

(1) *R. ll. 1 and 7, tit. 10, B. 5—C. art. 4, 5, 6, 7, p. 208.*

LAW 2.

Who they are that can not make a donation.

If it should be discovered that any person meditated the death of the king, or to do him bodily harm, or to divide his empire or any part of it : such person can not make a donation of the whole or any part of his estate, from the day he meditated and advised the perpetration of the crime, and if he does, the donation will not be valid. And so we say it would be with respect to any one who should meditate the death or bodily harm of those whom the king had particularly selected, as his chosen and honoured counsellors. And we also say that if any person be convicted of heresy, by a sentence of the holy church, any donation he should afterwards make, would be, in no wise, valid. But if a man should be accused of a crime, for which, if proved upon him, he would suffer death or perpetual banishment ; we say that any donation made by him, before sentence is given against him, will be valid, though it would not be valid, if made after sentence pronounced. And we moreover say that if the donation were made before he had committed the crime, though he should be afterwards accused and sentence rendered against him, yet the donation would be valid.

LAW 3.

Who are the children that can make donations, and to whom ; and how the donation may be valid, which the father makes to his son.

The son or grand-son, while under the power of his father or grand-father, cannot make a donation, with-

out the consent of him under whose power he is : unless he were a military man who had acquired something in war, or a person who had made any of those gains called in latin *castrense* or *quasi castrense peculium* : for he may make a donation of these, without the consent of him under whose power he is. But if the son or grand-son possess any distinct *peculium*, which his father or grand-father had given him, as the means of acquiring something ; notwithstanding it proceeded from his father or grand-father, yet he may give any part of it to his mother, or sister, or niece, or to any other of his relations, either, on account of their marriage, or for any other cause, when they stand in great need, and it were just, lawful and proper to do so. And so we say it would be where he gave any thing, as a salary to his teacher who had instructed him, in any science, art, or trade : but he could not do it, in any other way. And moreover if the father give any part of his estate to his children, such donation will not be valid. For if the child to whom it is made have other brothers, he will be obliged, after the death of his father, to bring back what he had received and put it in partition with the others, or to deduct it from his part, by delivering to each of the other brothers, so much of the succession, as amounts to the value of the donation which his father had given him : unless the father, on making his son a knight, had given him a horse and arms, or had given him books to enable him to be instructed in some science : for a donation made in any of these ways

would be valid, and the son would not be obliged to bring it in partition, with his other brothers. (1)

LAW 4.

In what manner a donation may be made.

A donation may be made in four ways. The first, when it is made without any condition, The second, when the donor annexes a condition to it. The third, when both the donor and donee are present in the same place. The fourth, when the person who intends making the donation, is in another country. In this last case, he cannot make the donation, except by writing, or by a messenger whom he sends to declare expressly, what it is that he gives, and when the donation is made simply in writing or verbally, without delivering the thing to the donee; the donor, or his heirs will be bound to complete it. But this must be understood in this wise; that if he who has to complete the donation, be so rich, that enough be left him of his own, to enable him to live independantly, without asking any thing of other persons; then he would be bound in every respect, to complete the donation. But if, by satisfying the donation, he should not have wherewith to live, then he will not be bound to complete it. (2)

(1) *R. ll. 1 and 10, tit. 6, B. 5.—ibid ll. 1, 2 and 5, tit. 2, B. 5.—C. art. 193 and 207 p. 192 and 196.*

(2) *R. l. 2, tit. 16, B. 5.*

LAW 5.

In what manner a conditional donation is valid.

If a man make a conditional donation, as where he says: "I give you such a field, or such an estate, if your father should emancipate you from his power." If the condition be accomplished, the donation will be valid, otherwise it will be of no effect. But if the father happen to die before he had emancipated his son from his power, then the donation would be valid, notwithstanding the condition had not been accomplished in the manner in which the donor understood it; in as much as the condition is accomplished by the death of the father whereby the son is emancipated from his power. For in this and all other like cases where a condition is annexed, in whatever way the will of him who stipulated it, is accomplished, the donation subject to such condition, will be valid (1).

LAW 6.

In what manner a donation made for a certain cause or consideration is valid.

Men are sometimes induced to make donations from certain causes or particular reasons, without which they would not have made them; as where one man gives another, a sum of money, or an estate, expressly declaring at the time he make the donation, that he gives it, in order that the donee may, by that means, be always provided with a horse and arms for

(1) *R. l. 2, tit. 16, B. 5.*

his service; or where he makes the donation to any artificer, and declares openly that he makes it for certain work or service which the donee was to render him. Wherefore we say, that if the person who receives a donation in the manner above mentioned, complies with the agreement, or condition, or does that for which it was given, the donation will be valid in every respect: but if he should not comply therewith, or faithfully execute that for which it was given, he may be compelled to comply with what he had promised, or to abandon the donation which had been made to him. We likewise say, that if one man give another a vineyard, or garden, or an estate, or any other thing whatever; declaring expressly at the time he made the donation, that he gave the thing, with the intention that a certain portion of the fruits arising from it, should be given to another person for his maintenance, or to redeem him from captivity, or for any other like purpose: if the donee comply with the object for which it was given, the donation will be valid; and if he should not, the donor may revoke it. And donations of the kind mentioned in this law, are called in latin *sub modo*: which means in common speech, a donation made for a certain purpose (*so otra manera.* (1))

LAW 7.

Of donations made to endure until a certain day, or specific time.

A donation may be made to endure until a certain day, or determinate time: as where the donor says to the

(1) *R. l. 2, tit. 6, B. 5*

donee, "I give you such an estate or such a thing, that you may cultivate it, gather its fruits, and enjoy the profits of it, until such a day or such a time ; after which you must abandon it, that it may go to my heirs, or to any other person whatever whom the donor may designate to that effect." We therefore say, that a donation made in this manner, will be valid until the day or time which is indicated by the donor : and after the expiration of that time, the possession and property of the thing, will pass to the heirs of the donor, or to any other person whom he designates, as entitled to it. And if the donor happen not to designate any person, at the time of the donation, who is to have the thing, after the expiration of the time fixed, we say it will belong to the heirs of the donor who inherit his other effects. (1)

LAW 8.

Of the donations which men are induced to make, on account of their having no children ; that they are not valid, if the donors afterwards have children.

Men are sometimes induced to make donations because they have no children, and do not expect to have any. We therefore say, that if any one, through such a motive, give another the whole, or a great portion of his estate, and he afterwards have a son, or daughter, by his legitimate wife whom he had since married ; that immediately upon the birth of the child, the donation is revoked, and will, in no wise, be valid. And if any one who has legitimate children, should wish to make a

(1) R. l. 2, tit. 16. B. 5.

donation to another person, he may do so, provided he does it, in such manner, as to leave to his children the legal portion which ought to be reserved to them, as well during the life of their father, as after his death.

(1) And this legal portion is that which is fixed in the title which speaks of the institution of heirs. And if the father make a greater donation, it may be reduced by his children, to the amount which he can dispose of, above their legal portion. (2)

LAW 9.

What portion of his estate, may a man give away ; and that for the surplus, the donation may be revoked.

The emperor or king may make a donation of whatever he please, either in writing or without, and it will be valid. And so we say it would be, with respect to other men, when they wish to give any thing to the emperor or king. For it is but just, that since the emperor or king can make donations with or without writing, that they who wish to make donations to them, should be able to do it in like manner. We moreover say, that when the emperor or king makes a donation to a church or an Order of men, or to any other person whatever, as also to a town, or castle, or any other inhabited place, or to one that becomes so afterwards ; if at the time he makes the donation, he stipulates by his

(1) Id est neque in vita neque in morte donavit vel legavit ultra legitima. Hoc dicit Gregorio Lopez.

(2) *R. l. 1, tit. 2 ; l. 11, tit. 6 ; l. 8, tit. 10, b. 5.—C. art. 19 & 26, p. 212, 214.—Ibid art. 66, 74, 75, 76, 77, 79 & 80, p. 222 & 224*

letters (*por su privilejo*) that he gives the place, with all the rights he has or ought to have to it, reserving nothing whatever ; it is understood that he gives it, with all the taxes and revenue which he usually derived therefrom. But it is not understood that he gives of those things which appertain particularly to the sovereignty of the kingdom, as the right of coining money, or of administering criminal justice. But if all these things be expressed and granted in the act of donation (*privillejo de la donacion*,) then they will pass to the place or person to whom the donation is made ; except however, that the high-roads of the place, will remain to the king who made the donation, and to his successors ; and the inhabitants will be bound to make war or peace, at his command. We likewise say, that every man may make a donation, either with or without writing, to any amount he pleases, to ransom captives, to rebuild a church or house fallen in ruins ; or as a dowry, or donation in marriage. And so we say that a man may make a donation to a church or religious place, or a hospital, without writing. And he may likewise make it to any person or place, without writing, to the amount of five hundred maravedis of gold. (a) But if he wish to make a greater donation than what is above mentioned in this law, it will be

(a) According to the calculation made by Febrero, and which we have mentioned in vol. 1, p. 595, in a note upon the 11th law, tit, 23, of the 4th Partida, the 500 maravedis of gold spoken of above, will make 25,600 reals of Spain, or 1280 dollars of our money. But notwithstanding the calculation of Febrero is most probably correct, yet he confesses that other authors calculate differently, and he therefore expresses a desire that the monarch should fix a determinate value to that coin.

void for all it contains over that sum ; unless he makes it in writing, and with the knowledge of the principal judge of the place where it is made. (1) (2)

LAW 10.

That donations may be revoked on account of ingratitude.

Men are sometimes ungrateful towards those who have given them any thing, or conferred favours upon them : the ancient sages have therefore thought that they ought not to go unpunished, and have ordained that they should lose the thing given them, in four different cases. The first is, where the donee is ungrateful to the donor, dishonoring him either by words, or by accusing him of some crime, which if proved, would expose him to the punishment of death, or loss of limb, or to infamy, or the loss of the greater part of his estate ; for although any other person might speak against the donor, yet the donee neither shall or ought to do it himself. The second is where the donee commits some injury in fact upon the donor ; as by laying violent hands upon him. The third is where the donee does the donor great damage in his property. The fourth is where he endeavours, in any way, to destroy his life. But if a woman who has a child by her husband, make a donation to such child, after the

(1) *R. l. 1, tit. 2---l. 12, tit. 6---l. 7, tit. 8---ll. 4, 8, tit. 10, b. 5, C. art. 53, 62, p. 220, 222.*

(2) *With the knowledge of the judge, that is to say that a donation, in order that it may be binding, should be presented to the judge of the place for his approbation, which is called insinuation, in law. Febrero adicionado part 1, chap. 5, § 1, no. 9, vol. 2, page 306, 307.*

death of the father, and then marry another man ; although we have said there are four reasons for which a donation can be revoked, yet in this last case there are but three. The first, where the child endeavours to take away the life of the mother, after the donation was made. The second, where he lays violent hands upon her. The third, where he endeavours to cause her to lose the whole, or the greater part of her estate : for any of these three causes, the mother may revoke the donation she had made to her child. And the donor may allege and avail himself of the causes of ingratitude mentioned in this law : but if he be silent in this respect, during his life, his heirs cannot afterwards complain and annul the donation on that account. (1)

LAW 11.

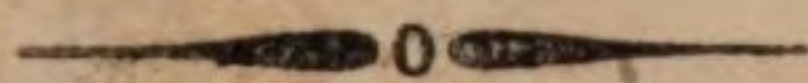
Of donations which men make in time of sickness ; which of them are valid, and which are not.

Men sometimes make donations while they are afflicted with disease, or fear other dangers which they have not the power to resist : we will therefore speak of this kind of donations. And we say that the donation which a man makes, of his own accord, while he is sick, or fears death, or any other danger, is valid (a) : yet it may be revoked in three ways. The first is where the donee dies before the donor. The second, where the donor is cured of the infirmity, or escapes

(1) *C. art. 68, p. 222.*

(a) It is what is called *donnatio mortis causa*.

the danger which induced him to make the donation. The third, where the donor repents, before he dies, of having made the donation. And such donations as these, can be made by every man who has the right to make a will, and ought to be made before five witnesses at least. And although we said in the title of wills, that the son under the power of his father, cannot make a will ; he may nevertheless make a donation of the kind herein mentioned, with the consent of his father, and it will be valid. And we say finally, that if any one make a donation, through compulsion, or through fear of being killed, such donation will not be valid. (1)



TITLES,

Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on sale and purchase.

Digest lib. 18, tit. 1. *De contrahenda emptione.*

Digest lib. ib. tit. 2. *De in diem addictione.*

Digest lib. ib. tit. 3. *De lege commissoria.*

Digest lib. ib. tit. 4. *De hereditate vel actione vendita.*

Digest lib. ib. tit. 5. *De rescindenda venditione.*

Digest lib. ib. tit. 6. *De periculo et commodo rei venditæ.*

Digest lib. ib. tit. 7. *De servis exportandis vel si ita mancipium venderit ut manumittatur, vel contra.*

(1) C. art. 3 and 81, p. 208 and 226.

Digest lib. 19, tit. 1. *De actionibus empti et venditi.*

Digest lib. 20, tit. 5. *De distractione pignorum et hypothecarum.*

Digest lib. 21, tit. 1. *De ædilitio edicto et redhibitione et quanti minoris.*

Digest lib. ib. tit. 2. *De evictionibus et duplæ stipulatione.*

Digest lib. ib. tit. 3. *De exceptione rei venditæ et traditæ.*

Digest lib. 42, tit. 5. *De rebus auctoritate judicis possidentis, seu vendendis.*

Code lib. 4, tit. 38. *De contrahenda emptione et venditione.*

Code lib. ib. tit. 39. *De hereditate, vel actione vendita.*

Code lib. ib. tit. 40. *Quæ res vendi non possunt, et qui vendere vel emere vetantur.*

Code lib. ib. tit. 44. *De rescindenda venditione.*

Code lib. ib. tit. 45. *Quando liceat ab emptione discedere.*

Code lib. ib. tit. 46. *Si propter publicas pensitationes venditio fuerit celebrata.*

Code lib. ib. tit. 47. *Sine censu vel reliquis fundum comparari non posse.*

Code lib. ib. tit. 48. *De periculo et commodo rei venditæ.*

Code lib. ib. tit. 49. *De actionibus empti et venditi.*

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Code lib. ib. tit. 54. *De pactis inter emptorem et venditorem compositis.*

Code lib. ib. tit. 55. *Si servus exportandus vendeat.*

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Code lib. 4, tit. 57. *Si mancipium ita fuerit alienatum ut manumittatur, vel contra.*

Code lib. ib. tit. 58. *De ceditiis actionibus.*

Institutes lib. 3, tit.

24. - - - - - *De emptione et venditione.*

Recopilacion de Castilla, book 5, tit. 11.

Domat's civil law, part 1, book 1, tit. 2.

Civil Code, book 3, tit. 6, of sales.

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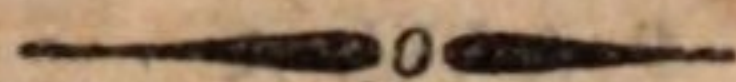
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TITLE V.

Of Sale and Purchase.

LAW 1.

What a sale is.

Sale is a species of convention in use among men effected by the consent of the parties, for a price certain, agreed upon between the buyer and seller. (1)

LAW 2.

Who are and who are not capable of selling.

We say that those persons are capable of buying and selling, who can reciprocally obligate themselves to one another. Therefore a sale from the father to the son whom he has under his power, or from the son to the father, will not be valid, because they cannot contract the one with the other: for though they are naturally two persons, they are considered in law, as one only. But if the son has made any of those

(1) C. art. 1, p. 344.

acquisitions called *castrense* or *quasi castrense*, according to what we have said in the title which treats of paternal power; such things as these he may lawfully sell to his father. (1)

LAW 3.

That no person can be compelled to sell what belongs to him.

Neither force nor violence should be used to compel a man to sell, or to buy any thing against his will; and if he does either, through fear, the contract will not be valid. Nevertheless if two persons own in common, a slave whom one of them is willing to enfranchise and the other not; he that is willing, may buy the part of the other, although he should refuse to sell: and by giving a just and adequate price, according to the estimation of two discreet men, he may compel him to receive it, by applying to the judge of the place, and to deliver up the slave, to be enfranchised. And so we say it would be where a man has a slave whom he treats in a cruel and unusual manner; as if he should not give him sufficient food, should wound him badly, or command him to do any thing contrary to reason and law. For these and the like causes, the master may be compelled to sell his slave, against his will, as we have said in the fourth part of this book in the title which treats of liberty. (2)

(1) *C. art. 14, p. 348.*

(2) *C. art. 27, p. 42—ib. art. 2, p. 102, ib. art. 9, p. 262.*

LAW 4.

That guardians cannot buy any thing belonging to minors whom they have under their care.

They who are guardians of minors under fourteen years of age, are in Latin called *tutores*: as such, they cannot sell the estates of their pupils, unless in cases of indispensable necessity, or to obtain some great advantage for them: and then, not until after the fullest consideration of the matter and under the authorization of the judge of the place. (a) And we say that no guardian can purchase any thing belonging to the estate of his pupil, unless authorised to that effect, by the local judge, or some other guardian who has a joint care of the minor with himself. It is further necessary that such purchase be beneficial and not injurious to the minor: for if he be prejudiced by the sale, he may have it rescinded, at any time, within four years after he has come of age, as we have said in the laws which treat of the guardianship of minors and their estates. (1)

LAW 5.

That presidents of provinces and the ordinary judges cannot buy any thing, within the limits of their jurisdiction.

(Not in force.)

LAW 6.

In what manner sale and purchase should be made.

Sale and purchase may be effected in two ways;

(a) This provision was repealed by art. 56, p. 68, of the Civil Code, but revived by an act of the Legislature of the 20th March 1811.

(1) C. art. 51, p. 68.

the one in writing and the other without. (a) In writing when the buyer says to the seller, I wish to have this sale reduced to writing." A sale made in this manner, is not perfect, although the parties are agreed upon the price, until the writing is made and executed; for until then either of them, may retract. But after the writing is once made and perfected, in presence of witnesses, neither party can recant and sue for the re-cision of the sale. Without writing, when the seller and buyer have mutually agreed upon the price: the one being pleased with the price and the other with the thing, without mentioning any writing. We say that a sale thus made would be perfect although no earnest had been given by the buyer to the seller; as they would be both bound for the fulfilment of the contract they had made.

LAW 7.

Who gains the earnest given on account of the sale, if it should not be perfected.

Earnest is sometimes given upon a purchase being made; and it then happens that one of the parties recant. Therefore we say, that if it be the buyer that recants, let him lose the earnest he had given: but if it be the seller, let him return to the buyer the double of the earnest and the sale will be null. But if the buyer, at the time he gave the earnest, declared that he gave it both as earnest and as a part of the price,

(a) Every sale of immoveable property and slaves must be in writing, c. art 2, p. 344.

or as a token of the perfection of the bargain, then neither party can recant and rescind the contract. (1)

LAW 8.

That a sale may be effected, though neither the buyer or seller be present, when it is made.

A sale may be made when the buyer and seller are present; and also when they are in different places, by letter, or by attorney, both consenting thereto; the buyer to take the thing and the seller the price. We moreover say that the sale may be made, though the thing sold should not be in the presence of the buyer and seller, provided they agree, as is above said.

LAW 9.

That the price should be expressed with certainty in the sale.

It is necessary for the validity of the sale, that the price agreed upon between the buyer and seller, should be certain. For if the seller should say; "I sell you this thing for as much as you choose to give; or for as much as I choose to take:" such a sale would not be valid. But if they both agree upon a third person, to whom they present the thing, that he may fix the price for which it is to be sold, and he fix it accordingly, the sale will be valid: and if he fix an unreasonable price, either too much above or below the value of the thing, it ought to be corrected by discreet men. But if such third person to whom the

(1) C. art. 10, p. 346.

price were referred should die before he had fixed it, the sale would not be valid. (1)

LAW 10.

In what manner a sale may be valid, though no certain price be therein expressed.

If the vender agree to sell a thing to the buyer, for as much money as the latter has in a certain chest, sack, portmanteau, or in any other place ; the sale would be valid, if any money should be found therein, whatever might be the sum, although it should not be equal to the value of the thing. But if no money happen to be found therein, the sale would not be valid ; for there cannot be a sale, without a price. Moreover we say that if a man sell any thing and the buyer agree to give what it cost the seller, the sale will be valid, if it should turn out that the buyer had really bought it. But if it appear that he had acquired it by donation, or inheritance, or in any other way than by purchase, then the sale would not be valid.

LAW 11.

What things can be sold.

Not only may things which exist, be bought and sold, but those which do not exist or appear : as where a man sells the child of a slave or the young of an animal then pregnant ; or the fruit of a vineyard, or estate or any other like thing. For although the thing does not appear, when it is sold, yet the sale is valid,

(1) C. art. 11 and 12, p. 346.

as the object is specified from which is to arise the fruit that is sold. But if such object should produce no fruit, then the buyer would not be bound to give the price, unless he had bought at his peril. We moreover say that a man may purchase an uncertain thing : as if one be fishing or hunting, and another should say to him ; I will give you so much for the first thing you take by fishing or hunting, and he agree to it ; although he does not know what he sells, yet the sale will be valid. And we further declare that if the buyer say he will run the risk for what the fisherman may take with the first cast of his net, or until a certain hour of the day, or during a whole day, he will be bound for the price he has promised although the fisherman should catch nothing. (1)

LAW 12.

That the sale of the offspring of a slave or mare, or other like thing, is valid.

If a man fraudulently sell the young with which he says a slave, mare or other animal is pregnant, when he knew they were barren, the sale will be valid notwithstanding the fraud. But the seller will be bound to give the buyer, what might have been the value of the offspring of the slave or mare, or to pay the damages he may have caused thereby. And so we say it would be, if he had sold the fruit of a vineyard or trees or other like thing, when he knew they would not produce any ; or when he practised fraud to pre-

(1) *C. art. 18 and 19, p. 348.*

vent them from producing ; for he would be bound to pay the buyer the estimated value of the fruits, and all the damages he had sustained by being deprived of them.

LAW 13.

How a man may sell the right he expects to have in the estate of another.

Men sometimes hope to inherit the estates of others : and this may happen in two ways : the one when a person expects to inherit from a relation so nearly a kin to him, that he will succeed to the whole of his estate, if he die without a will ; the other where he expects to be made the heir of any person. And as there are some who may wish to sell such hope, or right to inherit, we say they cannot do it, if they mention by name, the person from whom they expect to inherit ; unless it were done with the consent of the person himself ; in which case, the sale would be valid, if he continued in that intention until his death. But if he be not mentioned by name, the sale may be made by declaring that they sell for so much, and to such a person all the advantages and rights from whomsoever derived to them, by inheritance. And the reason we declare void such sales wherein are named the persons from whom the inheritance is expected, is that the purchaser of such hope or claim, may not, through a desire to enjoy it, attempt the life of the owners. (a)

(a) By the Civil Code, the sale of the succession of a living person is void, in whatever manner it may be made, art. 21, p. 348.

LAW 14.

In what manner a sale is valid, made of a mill, or house or other building demolished, or of trees torn up by the roots.

Where a man sells a house, or mill or any other building, at a time when it was demolished, burnt, or destroyed, in any other manner, without the knowledge of the buyer, the sale would not be valid, although the seller at the time, believed it to be sound and entire. And so we say it would be if he had sold trees under similar circumstances, which were at a distance ; that the sale would not be valid, if at the time he sold them, they were cut down, burnt, or torn up by the roots. And so we say it would be, if the greater part of the thing sold, were burnt or destroyed : but if burnt or destroyed in the least considerable part only, then the sale would be valid. (a) But in that case the price ought to be reduced, as much as the thing might be estimated to be diminished in value, on account of the part burnt or destroyed, at the time of the purchase. But if the seller declared the thing to be entire, when he knew it were burnt or destroyed, the sale would not be valid ; as a thing which does not exist, cannot be sold : and he would then be bound to pay the buyer, all the damages he had sustained for fraudulently and knowingly selling him a thing not in existence. But if the thing thus knowingly sold, were burnt or destroyed in part and not entirely, the sale would be valid, and the vender would be bound to pay the buyer

(a) This provision was amended by the Civil Code, c. art. 22 p. 348.

the loss and damages he had thereby sustained, for the amount of which he ought to be believed upon his oath, at the discretion of the judge. And we moreover say that if a man sell a thing burnt or destroyed in part and not entirely, and the buyer knew it at the time, while the seller was ignorant of it; the buyer would be bound to pay the whole price. But if he had sold it, burnt or destroyed, such as it was, informing the buyer of it, the sale would be valid.

LAW 15.

That a free man, a thing sacred or holy, or a public place cannot be sold.

A free man, a thing religious, sacred or holy, a public place; as public squares, roads, thrashing grounds, rivers and other waters which belong to the king, or the commons of any city, cannot be sold or alienated. But though we here say that a thing sacred or religious cannot be sold, yet there is a case in which it may be: as where a village or any other place is sold with all its dependencies. For though the church in the village, or any thing belonging to it, could not be separately sold, yet by selling the village, they would pass with all other things, and the sale would be valid, as we have said in the first part of our book, under the title which treats of things belonging to the church, and of those that can, and cannot be alienated.

(1)

(1) C. art. 16, p. 348.

LAW 16.

That the marble pillars, stone, or any other thing fixed to a house, cannot be torn away and sold.

The marble, or other stones, or the timbers, or any thing whatever, employed in the construction of any house, whether for its use or ornament, cannot be separated from it and sold; and if they should be, the sale thereof will be void. Nevertheless if any one contravene this law and sell any of these things, and they be delivered to the buyer, they shall remain with him: but he will be bound to pay the price to the king's court, and as much more out of his own estate. And if he had already paid the price, it must be restored to him: and the seller shall moreover pay out of his own effects, a sum equal to the price he had taken. And we further say, that a man cannot sell his fugitive slave, during his flight.

LAW 17.

That no one ought to sell poison or herbs with which life can be destroyed.

No one ought to sell or buy poison, herbs, or any other poisonous substance, by the eating or drinking of which life may be destroyed. Yet there are medical drugs, containing poisonous qualities which may be bought and sold; as scamony, or the like; which, though they possess such qualities, are used in certain diseases, being rendered harmless by mixture with other things.

LAW 18.

That the purchase which a man makes of his own property, is not valid.

A man cannot buy a thing that is his own ; and if he does it, through ignorance, he may recover back the price he had given, if the thing belonged entirely to him. For if another owned a part of it, the sale would be good as to that part, but not as to his own. But if a man had in his power or possession, any thing belonging to another, the owner might buy the possession and the sale would be valid. And we also say that if a man who is the possessor of a thing, purchase of another, his right or service in it, the sale would be valid.

LAW 19.

That one man may sell the property of another.

If a man sell any thing belonging to another, the sale will be valid. (a) But he who makes such a purchase either knew that the thing did not belong to the seller, or believed that it did ; if he knew that it was the property of another person, and should be compelled to restore it, by a judgment of court, nevertheless the seller would not be obliged to return the price ; unless he had obligated himself to do so, at the time of the sale, in case the owner should claim and recover the thing. But if the buyer did not know that it belonged to another person, in that case, the seller would be bound not only to return the price he

(a) This provision is abrogated by the Civil Code, art. 20, p. 348.

had received, but to pay all the damages he had caused by the sale.

LAW 20.

That the sale is not valid when the parties do not agree upon the price, or the thing which is the object of the sale.

The buyer and seller must agree upon the price : for if they disagree, the seller declaring it to be greater than the buyer is willing to admit, the sale would not be valid ; as where the seller should say that he sold the thing for a hundred maravedis, and the buyer should say, for no more than fifty, and there were no other means to discover the truth ; but if they disagree, the seller saying the price was less than the buyer contended for, then the sale would be valid. We also say that the sale would not be valid, if they disagree about the thing which was the object of it : as if the seller should say, that he sold a vineyard, or piece of land which he designates to be in such a place ; and the buyer should say he did not understand *that* to be the piece of land, but *another* which he designates to be in a different place : or if he should say that he sold such a slave, mentioning him by name, and the buyer should say he did not understand it to be *that* slave, but *another* of a different name. (1)

LAW 21.

That a sale is not valid where one thing is fraudulently sold for another.

If a man sell brass for gold, pewter for silver, or any

(1) C. art. 9 and 10, p. 262.

other metal whatever for another, the sale will not be valid. Also we say if a man sell a slave which turns out to be a female, when the buyer believed he was buying a male slave ; such sale would not be valid, although the seller did not know it was a female. And so the sale would not be valid, where a man knowingly sold for a virgin, a woman who was not so. Yet if when he made the sale, he believed her to be a virgin, it would be valid, though she were not. We also say that if a man have two slaves of different trades, and he sell one of them, designating him by the name of the one and the trade of the other, while he knew the names of both, he shall be sold who is mentioned by name, although his trade be mistaken. But if he did not know their names, the one shall be sold who is designated by his trade, although his name be mistaken.

(1)

LAW 22.

That Christians ought not to sell arms of wood, nor of iron to the enemies of the faith.

(Not in force)

LAW 23.

To whom belongs the profit, or who suffers the loss on the thing sold, when it is ameliorated or deteriorated.

A sale may be made in two ways, as we have said in the beginning of the present title of this book ; the

(1) C. art. 9 and 10, p. 262.

one in writing and the other without. When it is made without writing, the buyer and seller having agreed, the one upon the thing and the other upon the price: from that moment the loss happening to the thing, will be on account of the buyer. We also say, that when the sale is made in writing, as soon as it is finished and signed by witnesses, from that time, the loss will be on account of the buyer, although the thing had not yet passed under his power: as where a man buys a slave, or any animal whatever, and after the sale is perfected, it fall sick, so as to loose a limb, or die, without the fault of the seller: or if he had bought any thing else and it be destroyed by fire, or thrown down in whole or in part, or otherwise deteriorated, without the fault of the vender; and so we say it would be, if the thing be lost or deteriorated in any other similar manner, without the fault of the seller. In these and all like cases, the loss which happens to the thing bought, will be on account of the buyer alone. We likewise say, that after the sale is perfected in one of the ways above mentioned, the amelioration of the thing bought, will be for the benefit of the buyer, though it had not yet passed under his power; as where a man had bought a field or vineyard, and after the sale, it were increased by the inundation of a river that added thereto a portion of earth with trees or other thing upon it, by which the thing sold was ameliorated: or where the thing was worth at the time of the sale a hundred maravedis, and afterwards by a change in the circumstances of the times, comes to be worth two hundred, or more. For how much

soever it may be ameliorated, after the sale is perfected, in any of the foregoing ways, or in other the like, all the amelioration will be for the benefit of the buyer. For it is but just, that as the loss belongs to him, according to what we before said, in case the thing be lost or deteriorated ; so should any amelioration that may happen to it. (1)

LAW 24.

To whom belongs the profit, or who sustains the loss which happens after the sale, to things that are usually counted, weighed, measured or tasted.

We have said that the damage which happens to the thing sold, after the sale is perfected, is on account of the buyer, although it had not passed under his power ; but there are things with which this is not the case ; as where a man buys wine, ginger, cinnamon or other like things usually tasted before they are bought ; or where the things are sold by weight or measure, and they be lost, or deteriorated before they are tasted, weighed or measured ; then the risk will be on account of the seller, and not of the buyer, notwithstanding they had agreed upon the price. But if they be lost or deteriorated after they had been tasted, weighed or measured, the risk will then be on account of the buyer and not the seller. But if the buyer and seller had agreed upon the price, and fixed on a day when the buyer should taste, weigh or measure the thing : if the buyer does not come at the appointed

(1) C. art. 48, p. 352—*ibid.* art. 38 and 39, p. 266.

day, and the thing be afterwards lost or damaged, then the risk will be on account of the buyer. But if it happen that the buyer and seller, after agreeing upon the price, fix no day on which the buyer should taste, weigh or measure the thing, as we have said ; then the seller may summon the buyer, in presence of witnesses, to come and taste, weigh or measure the thing sold : and if he will not come, and the thing afterwards perish, or be deteriorated, the risk will be on account of the buyer. And we also say that after the summons is made, the seller may, if he choose, sell the thing to another person ; and if he loose by the second sale, the first purchaser will be bound to indemnify him for the loss. And we say that the seller may even do more ; for if he have need of the vessels that contained the wine or other thing sold, he may hire others, at the cost and on account of the buyer. And if he happen to find none to hire, and those containing the thing sold, were necessary to him for gathering other fruits of a similar kind, as grapes or the like, and he had none to put them in, then he may throw the thing sold into the streets or public road, having previously weighed or measured it. And this he may do the day after the buyer was to have come and weighed or measured the thing, having been summoned to come and take it away. And what we here say, applies equally to every thing which is by custom, tasted, weighed or measured. But if the thing sold be gold, silver or wheat, or other like thing usually sold by weight or measure only ; then if any accident happen to it ; as if it be entirely, or partly lost, before it is weighed or

measured, the risk will be on account of the seller. But if things of that kind diminish or increase in value in the place where the sale is made, the consequent profit or loss will be on account of the buyer alone. (1)

LAW 25.

To whom belongs the profit, or who sustains the loss of things usually counted, weighed or measured, when they are sold by the lump and are afterwards damaged or ameliorated.

Things that can be weighed or measured, are sometimes sold on inspection by the lump, without either weighing, or measuring them; as where one man sells to another, the wine in a cellar, or the oil in a storehouse, or the grapes of a vineyard, or any like thing. Wherefore we say that if after the buyer and seller have agreed upon the price of any of these, or the like things which had been sold by the lump, on inspection, in the manner before mentioned, and they be lost, deteriorated or increased in value, the profit or loss will be on account of the buyer alone. (2)

LAW 26.

To whom belongs the profit, or who sustains the loss of things which are sold under condition and are afterwards ameliorated or damaged.

Where a condition is annexed to the sale, and the thing sold be deteriorated or ameliorated before the

(1) C. art. 6, p. 346.

(2) C. art. 7, p. 346.

happening of the condition ; then the loss or profit will be on account of the buyer. But if the thing be lost or wholly destroyed, in whatever way it may happen, the loss will be on account of the seller, though the condition should be afterwards accomplished. We also say, that where a sale is made under condition, and before its accomplishment, the buyer or seller, or both of them die, and the condition be afterwards accomplished, the sale will be valid, and their heirs will be bound to observe it. (1)

LAW 27.

On whose account is the damage happening to the thing sold, when it is deteriorated, through the delay of the seller to deliver it.

Where the seller delays to give, or to deliver to the buyer, the thing sold, after they had agreed upon the price ; and the buyer summon him before witnesses, to deliver it and receive the price which he presents and invites him to accept ; if he should not then deliver it, and it be afterwards lost or deteriorated, the risk will be his, on account of his delay. Yet if afterwards the seller should wish to deliver it, before it were lost or deteriorated, and the buyer should be in default, being unwilling to receive it ; and then the thing be lost or deteriorated, the risk will be on account of the buyer, because the ultimate delay was caused by his fault. (2)

(1) *R. l. 2, tit. 16, b. 5--C. art. 81, p. 274, and ib. art. 5, p. 346.*

(2) *C. art. 46, p. 268.*

LAW 28.

What things ought to be done, and what stipulations observed by those who buy and sell.

The buyer ought to pay the seller the price he promised. And the seller ought to deliver to the buyer, the thing sold, with all its appurtenances. Therefore we say, that where a man sells a house, it is not understood that he sells a house only, but the wells, canals, aqueducts, and all other things which are generally appropriated to the use of the house, whether they are within or without. So we say the seller cannot take away the bricks, stones, tiles or wood which had been detached from the house sold, or were then employed therein, if they made a part of the house. But if he had bought lime, bricks, tiles, timbers or other like things ; or had borrowed them, or if they had been given to him : although he may have brought them there, with the intention to use them in the construction of the house, yet he may take away those he had not used for that purpose. (1)

LAW 29.

That the granaries and jars sunk in the ground, which are in the house sold, belong to the buyer.

The seller cannot take away the granary which is affixed to the house sold, or which was so large as not to be moved ; nor the oil jars also affixed to the house, or sunk in the ground, or any like thing : for such

(1) *R. l. 2, tit. 16, b. 5—C. art. 24, p. 348—ib. art. 39, p. 352, & ib. art. 82, p. 360.*

things as these are understood to appertain to the house and therefore belong to the buyer. But all other moveable things not affixed, nor appertaining to the house, belong to the seller, who may take them away and do what he pleases with them : as the cup-board, casks, and unburied jars and other similar things.

LAW 30.

That the fish bred in the ponds appertaining to the house sold and other animals raised about it, belong to the seller.

The fish bred and found in a reservoir or fish pond appertaining to a house or estate, at the time of the sale, belong to the seller, as also do the chickens and other fowles raised about the house. And what we here say of animals usually raised about houses, and what we said in the preceding law of houses themselves, apply also to castles, farms, or any other plantation that is sold.

LAW 31.

That the olive presses or mills, or the cellars (bodegas) containing jars, which are in the fields, vineyards, or olive gardens that are sold, do not belong to the buyer, unless they have been expressly mentioned in the deed of sale.

When an olive orchard, a field, vineyard, or garden is sold in which there is a wine or an olive press, or mill, or other separate thing, as a granary or cellar, containing jars to hold wine ; none of them are considered as a part of the purchase, unless so stipulated in the sale ; or unless they had been purposely erected to receive and preserve the fruits of the estate sold. We

also say that if a man sell a vineyard, or vine arbour which is in need of props to support the vines ; and the seller had already cut or bought some for that purpose ; yet if he had not placed them under the vines, they would not be considered as a part of the purchase. But if he had once placed them, although he had again taken them away to replace them the ensuing year, they will still belong to the buyer.

LAW 32.

That the seller is bound in warranty to the buyer for the thing sold.

The thing sold ought to be delivered to the purchaser, free and clear of all incumbrances, so that if any one disturb him, or bring a suit therefor, the seller will be bound to guaranty him. But as soon as the suit is commenced, the buyer ought to notify the seller of it : or at least before the depositions of the witnesses produced against him in court, are published. And if he does not so notify him, and he be afterwards cast in the suit, he cannot then demand the price of the thing, neither of the seller, nor his heirs. But if he does inform him and the seller would not or could not defend him in the suit ; then the seller will be bound to restore the price he had received for the thing sold, and pay all the damages consequent thereupon. And if at the time of the sale, the seller had bound himself in a double penalty to guaranty the buyer, it is then understood that he is bound not only to

return double the price, but double the value of the thing, although it may have since increased. (1)

LAW 33.

If any thing belonging to another, be sold, the owner may reclaim it of him in whose power he finds it.

Where a man sells the property of another, the owner may reclaim it of the buyer with whom he finds it. But if the buyer require the seller to come in court, to defend him, and answer to the suit brought for the thing sold: and the seller consent to appear against the plaintiff, obligating himself to defend the thing in the same manner as if he were in possession of it himself, then the plaintiff will have no right to demand it of the buyer; but rather of the seller, and should let the buyer go in peace. But if the seller will not appear and contest the suit, then the plaintiff may demand the thing of the buyer. Neversheless the buyer will retain unimpaired the right to sue the seller in warranty for the thing sold.

LAW 34.

In what manner the seller is bound in warranty, where he sells his right to the inheritance of a third person to whom he has been instituted heir.

If a man who had been instituted heir of another, sell all his right to the estate or inheritance of him who instituted him, and the purchaser be afterwards evicted

(1) C. art. 24, p. 348—ib. art. 49, p. 354—ib. art. 64, p. 356.

by a judgment of court, of any part of the estate, the seller will not be bound to guaranty that part of which he was so evicted. But if he were evicted of the whole, he would be then bound to indemnify the buyer, or to pay back the price he had received, with all the loss and damages sustained. And so we say it would be where a man had bought all the revenues of certain customs, or of an estate, and were afterwards evicted by a sentence of court, of any part of the same, the seller would not be bound to indemnify him or account therefor. But if he were evicted of the whole, or of the greater part of the revenues, he would be then bound to indemnify the buyer, or to return him the price, with all the damages and loss he thereby sustained.

(1)

LAW 35.

That a man is bound to guaranty the house, ship, or sheepfold which he sells.

Where one sells a house, ship or sheepfold, or any like thing, together with their appurtenances, and the purchaser be evicted of any part thereof by a judgment of court, the seller will be bound in warranty therefor, in the same manner as if the buyer had been evicted of the principal object of the sale. (2)

(1) C. art. 128, p. 386.

(2) C. art. 49, p. 354.

LAW 36.

In what cases the seller is not bound to guaranty the thing sold to the buyer.

According to what we have above said, the seller is bound to guaranty the buyer for the thing sold ; or if he does not, to return the price and pay all the losses and damages sustained by him on that account. But there are cases where it is not so. The first is where the buyer delays to inform the seller of the suit commenced for the thing sold, until after the publication of the depositions of the witnesses. The second, where the cause is submitted to arbitrators, without the knowledge or order of the seller, and they give sentence against him. The third, where the buyer by his fault, loose possession of the thing sold. The fourth, where he has abandoned the thing and thereby looses it. The fifth, where the thing sold is a female slave and the buyer put her in a brothel : for on that account she may claim her freedom ; and if she in fact, do and obtain it, the seller will neither be bound in warranty, nor to return the price. And so we say if the buyer be contumacious at the time the court is about to pronounce sentence against him for the thing he had bought, and refuse to appear and hear the judgment, and on account of his contumacy, he loose the thing ; that then the seller would not be bound in guaranty, nor to return the price he had received. The sixth, where the buyer had been so long in possession of the thing bought that when he is sued for it, he might have defended himself by pleading prescrip-

tion, but did not do it. The seventh, where sentence is rendered relative to the thing bought, the seller not being present, nor notified by the buyer of the time where it was rendered. And so we say, if a man play at draughts or dice, and while at play, he sell or lose any thing, and the purchaser or winner be afterwards evicted thereof by a judgment of court, the seller will not be bound either in warranty, or to restore the price. And so it would be where the buyer consented that the thing he had bought, should be made sacred, or made no opposition to it. And we say also that if a judge knowingly pronounce an unjust sentence against the buyer, for the thing he had bought, then the judge and not the seller will be bound to indemnify him, out of his own effects, for having wrongfully deprived him of it : for the seller is not bound to guaranty otherwise than according to law. (1)

LAW 37.

That the seller is not bound to guaranty the estate sold, if the king take it away from the buyer.

(Not in force.)

LAW 38.

What are the agreements or stipulations that can be validly made between the buyer and seller.

Every agreement or stipulation entered into between the buyer and seller, must be observed, unless they be contrary to good morals, or the laws of our

(1) C. art. 54, p. 354.

code ; so we say, if they were to stipulate, that the buyer should pay the price on a day certain, and in case he did not, the sale should be dissolved, such a stipulation would be valid ; and the sale will accordingly be dissolved ; and the seller will then acquire the earnest, or the part of the price that had been paid him ; unless he had received the whole or the greater part of it, on the day fixed. Nevertheless the seller has the choice either to demand the whole of the price and the performance of the sale ; or to revoke it, and retain, as is above said, the earnest or the part of the price he had received. But when he has selected one of these alternatives, he cannot afterwards abandon it and choose the other. We also say that if the buyer had gathered any fruits from the thing bought, he ought to return them to the seller ; unless the seller were unwilling to return the earnest, or the part of the price he had received, for then he would not be entitled to the fruits. But if the seller choose to take the fruits, he will be obliged to reimburse the buyer the expence he had incurred in gathering them. We also say that if the sale be dissolved, and the thing had been deteriorated through the fault of the buyer, while in his possession, he will be obliged to indemnify the seller therefor. (1)

(1) *C. art. 86, 87 and 88, p. 360 and 362.*

LAW 39.

Of the agreement which the seller makes with the buyer, concerning the loss happening to the thing sold before its delivery.

When the seller makes an agreement with the buyer, that if the thing sold be deteriorated or lost before delivery, such loss or deterioration shall be borne by the seller; then we say the risk will be on account of the seller. And so it would be if the thing sold were wine, and he should tell the buyer, that it was of such a place or of such a quality, that he might keep it a long time without spoiling; for if it spoil, or be deteriorated before it is delivered, the risk will be on account of the seller and not of the buyer. And so we say it would be if the seller knew the wine were of a nature to spoil, and had concealed that circumstance.(1)

LAW 40.

Of the stipulations which the seller annexes to a conditional sale.

Other agreements are sometimes annexed to sales; as where the seller says to the buyer, "I sell you my vineyard for such a price, upon condition, that if before such a day I find any one who will give more, I may sell it to him." And we say, that where a sale is made in this manner, if before the day appointed, the seller find some person who will give him a greater price for the vineyard, or who offered him greater advantages than the other had promised him; he ought

(1) *R, l. 2, tit. 16, B. 5.*

to inform the first purchaser what those advantages are : for if he offers the same, the seller ought to accept and leave the vineyard to him, on his paying the price agreed upon, with what the other had offered in addition : but if the first purchaser will not consent to this, the sale will not be valid, and he will be obliged to deliver up the vineyard, with all the fruits he had gathered from it, first deducting the expenses he had incurred in gathering them. But if the person who offered to increase the price, as is above said, were the son or slave of the seller, or any one else who did it fraudulently, by his advice ; then the buyer would not be obliged to return the vineyard, nor to observe the condition. (1)

LAW 41.

Whether or not the agreement be valid, which is made concerning a pledge that is to become the property of the pawnee, unless the condition be performed by a certain day.

If a man pledge any thing under condition, that if he do not redeem it by a certain day, it shall pass by purchase to the pawnee, on his paying its value to be estimated by good men ; such a contract will be valid. (a) But if the pawnee had bought it in a different manner by stipulating, that if it were not redeemed by a certain day, it should become his property for the sum for which it was pledged ; such contract or sale would not be valid. And the reason why we declare

(1) *R. l. 2, tit. 16, b. 5.*

(a) This provision appears to be repealed by art. 12, p. 448 of the Civil Code.

such contracts void is, that otherwise they who lend money on pledge, would not lend on any other terms; and persons oppressed with want, would make such agreement, though they knew it would be to their prejudice. (1)

LAW 42.

Of those who sell a thing at a certain price, on condition that the seller or his heirs may take it back, on reimbursing the price.

Where a man sells any thing for a certain price, stipulating in the sale that whenever the seller or his heirs shall return the price to the buyer or his heirs, that the latter should restore the thing bought: we say, that if such a condition be contained in the sale, it ought to be observed. But if the buyer or his heirs be not willing to perform their agreement, nor to restore the thing, as is above said, they ought to pay the penalty, if any had been annexed to the contract. And if the seller or his heirs are willing to take the penalty, they ought to abandon the thing sold; but it would be otherwise if the condition had been that they should restore the thing and pay the penalty. And if no penalty were annexed, the buyer will, at any rate, be obliged to restore the thing if it were in his power; and if it were not, to pay the seller, all the loss and damages he had sustained on account of its not being restored. (2)

(1) C. art. 12, p. 448—R. l. 2, tit. 16, b. 5.

(2) C. art. 91, p. 362—R. l. 2, tit. 16, b. 5.

LAW 43.

If the seller stipulate with the buyer that he shall not sell or pawn the thing sold to certain persons, the contract ought to be observed.

If a man sell a castle, tower, house or any thing else, under condition that neither the buyer nor his heirs, should ever sell or alienate it to certain persons whom he designates by name, and if they did, that the thing should again become the property of the seller or his heirs ; such a contract we say will not be valid. And therefore though the buyer or his heirs should contravene the condition, neither the seller nor his heirs, can on that account reclaim the thing of him to whom it had been sold. But if a penalty had been annexed to the contract, he who had bound himself therein, would be obliged to pay it, as well as the consequent loss and damage, which ought to be ascertained by the oath of the seller, under the discretion of the judge. (1)

LAW 44.

Of those who by their wills forbid the sale of their castle, tower, house, vineyard or any other part of their estates.

When a man by his will, prohibits the sale of his castle, tower, house, vineyard or other part of his estate, alleging some good reason therefor ; as if he should say “ I desire that such a thing ;” expressly designating it, “ should in no wise, be alienated, but remain always with my son or heir, that he may be the

(1) *R. l. 2, tit. 16, b. 5.*

more honored and better supported ;” or if he should say “let it not be alienated until my heir come of age or until he has returned home, if he were gone to a foreign country ;” for these and other like justifiable reasons, it ought not to be sold. But if he had only said, “let it not be sold” without alleging any good reason therefor ; or had not designated any particular person or thing, as the object of such a disposition ; if then it were sold, the sale would be valid, although he had forbid it. (1)

LAW 45.

Of those who bequeath or sell a slave on condition that he shall be enfranchised by a certain time.

When a man gives or sells a slave on condition that he shall be enfranchised by a certain day, or in any other manner ; we say that although he who took him under such condition, should not enfranchise him on the day fixed, nor afterwards, yet the slave from that day, will be free. But if he had sold or given the slave under condition that he should be enfranchised at the will of the buyer or donee ; then he would be free from the moment of the death of him who took him under such condition or contract ; for after the death of a man, he no longer has the faculty to will, or not to will. And if he had sold or given him under condition that he who took him, should enfranchise him, when he was able ; and he did not do it within two months thereafter, the slave being present, would, under such a contract, be free from that time. But if the slave were not present in the place, with him who took

(1) *R. l. 11, tit. 6, b. 5.*

him under such condition, and he did not enfranchise him within four months thereafter, either in writing or verbally ; he would from that time, be free, although he were not enfranchised.

LAW 46.

Whether the sale of a slave on condition that he shall never be enfranchised, be valid or not.

Slaves are naturally prone to commit offences against their masters, unless restrained by fear of punishment. We therefore say, that when a slave commits such offense against his master, as obliges him to sell him, the master may stipulate in the sale, as a penalty, that he shall never be enfranchised. And if the buyer take him upon that condition, he can never afterwards become free, through however many hands he may pass, except in three cases. The first, is where the slave knows with certainty, that a plot exists against the life or honor of his sovereign, and he discovers it to him, either personally or through others. The second, when he avenges the death of his master by killing his slayer himself, or by prosecuting him before the judge of the place, until he suffer death. The third, is where he who took him under such condition, had bought him with the money of the slave, or of the slave's relations and not with his own : for in each of these cases, the slave may become free, notwithstanding the condition of the sale, (1)

(1) *R. l. 2, tit. 16, b. 5*

LAW 47.

Of the condition annexed to the sale by the seller of a slave, by which it is stipulated that he shall leave a certain place and return there no more.

The seller of a slave may annex to the sale a different condition from that mentioned in the preceding law ; as if he were to say to the buyer, "I sell you this slave on condition that from this day forward, he shall never more enter this town, or shall not remain in Spain ; and if he, in any manner contravene this condition, I may then retake him and hold him as my slave, and you shall pay me such a sum as a penalty, and all the damages I may have sustained on that account ;" such a condition as this being annexed to the sale, ought to be observed, and the seller may require its performance according to its tenor. But if the slave break the condition of the sale, without the knowledge of the buyer, either by flight, or connivance with the seller, the buyer will not then incur the penalty, as it was not his fault that the slave had entered the forbidden place. (1)

LAW 48.

Of the purchase which a man makes with his own money, in the name of another ; and whether the condition annexed thereto be valid.

When a man buys any thing with his own money in the name of another, and he in whose name it was bought ratifies the purchase, when he is informed of it ;

(1) *R. l. 2, tit. 16, b. 5.*

then he who made the purchase will be obliged to deliver over the thing to him in whose name he made it, with all its fruits and appertenances. We also say that he in whose name it was made, will be bound to reimburse the price to the purchaser, with all the expenses he had incurred either in gathering the fruits, or otherwise, for the benefit of the thing sold. And so we say, if a man send his messenger, saying to him: "go to such a person and tell him, that if he will sell me such a thing belonging to him, I will give him such a price for it;" if the person to whom the message is sent, consent to sell the thing for the price proposed, the sale will be valid, although the messenger may not have had a letter of attorney authorising him to make the purchase. Moreover he in whose name the purchase was effected, will be obliged to observe all the conditions annexed to it by him who made it in his name: for as he ratified the bargain, he will be bound to fulfil its conditions. And so it would be where one man constituted another his attorney in fact, with power to buy or sell any thing in his name, fixing the price which he should take or give; if the attorney then signed the sale or purchase, in the name his constituent, the latter will be obliged to ratify it, and is as effectually bound thereby, as if he had personally signed it. (1)

LAW 49.

That the estate which a man buys with another's money which he has in his care, belongs to him, except in certain cases.

Men sometimes have the money of third persons in

(1) *R. l. 2. tit. 16, b. 5—C. art. 27 and 28, p. 424.*

their care and with it, buy estates, or other things they need ; and as doubts have arisen, whether the thing so bought, belonged to the buyer, or to those whose money he used, we will explain ourselves in this respect ; and we say that the thing belongs to him who made the purchase in his own name, unless the money he had used belonged to a military man (*cavalero*), then employed at the king's court or other place in the service of the king : or to a minor under twenty-five years of age, then under the guardianship of the buyer ; or to a church, and the prelate who then had the care of it, used the money to make the purchase : or was the dotal money of a wife whose husband had made the purchase with her consent. For in these cases, although the buyer bought in his own name, yet the thing becomes the property of those whose money was employed to pay the price. But they will each of them, have the choice, either to take the thing bought or demand the money. (1)

LAW 50.

Which of the two purchasers, ought to have the thing that has been sold to both of them, at different times.

Where a man sells the same thing to two persons at different times ; if the first purchaser were put in possession of it and had paid the price, it will belong to him, and not to the second. But then the seller will be obliged to return the price to the second purchaser, if he had received it, and pay him for all the loss and damage he had sustained by the fraudulent sale. We also say, if the second purchaser had come to the pos-

(1) *R. l. 10, tit. 1, b. 6.*

session of the thing and had paid the price, it will belong to him and not to the first. And then the seller would be, in like manner, obliged to return the price to the first purchaser, and pay him for all the loss and damage he had sustained on that account. We likewise say, that if a man sell any thing belonging to a third person, to two men at different times, and the two purchasers dispute about it; whichsoever of them first gets possession of it, will have the best right to it, and it ought to remain with him, though he had not paid the price. But if the owner come and claim the thing, he will nevertheless preserve all his right thereto. (1)

LAW 51.

Which of two purchasers, ought to have the thing belonging to a third person, that has been sold to them both, at different times.

Where a man sells any thing belonging to a third person and immediately delivers possession, and he afterwards acquire the property of the thing; as if the owner had instituted him heir, or had given it to him, in any other way, and he then sell it to another, who sues the first purchaser for it; we say that the first purchaser will have the better right to it, on account of his prior possession, notwithstanding the second purchaser should allege he has a better title, in as much as when it was sold to the first, the seller had not the property in the thing, and that he had sold it to the second, after he had acquired that property. But

(1) *R. l. 3, tit. 15, b. 5—Auto 21, tit. 9, b. 3—C. art. 41, p. 266.*

if a man sell any thing that does not belong to him, and afterwards the owner sell it to another person; the second purchaser, who bought it of him who had a better right to it, ought to have it: unless he who first sold it, had a just cause for so doing; as if it had been pledged to him on condition that he might sell it, if it were not redeemed before a day fixed: or if he were the attorney in fact of the owner, and in his letter of attorney, power had been given him to sell, and he had accordingly sold it, before he knew the owner wished to sell it to another.

LAW 52.

That judges, who have the right, in virtue of their offices, to order seizures, may sell things belonging to third persons.

Judges who have power to make seizures, in virtue of their offices, may cause the thing seized to be sold, to satisfy the judgment rendered, and the right of property will pass to any one who buys it. And we say, that the collectors of the royal taxes, have the same power to sell what they receive, or seize, for the collection thereof. But each of the above persons, who have the right to sell the thing seized, must do it publickly and not in secret, by putting it up and crying it off, at auction: nor ought it to be sold until after the expiration of ten days, when it may be sold to the highest bidder. And if it be sold for more than the sum for which it were seized, the overplus must be returned to the owner. And if any judge or other

officer sell the property of another person, in any other manner, the sale will not be valid. (1)

LAW 53.

Of the thing which the king sells or gives, as his own, when it belongs to another.

(Not in force)

LAW 54.

Of him who sells a thing belonging to another, in the name of the owner.

Where a man sells any thing belonging to another, in the name of the owner, who afterwards ratifies the sale, it will be valid and the property of the thing will pass to the vendee, although the sale was not at first made with the consent, or knowledge of the owner. But if he had sold it in his own name, and not in that of the owner, and the vendee knew that it was not his property ; then it would not pass to the vendee, nor could he acquire it by prescription : but the owner might, on the contrary, sue for and recover it. But if the vendee acted in good faith, when he bought the thing, not knowing it belonged to another, but believing it to be the property of the vender ; he might then acquire it by prescription ; and the vender will, in any event, be obliged to return the price to the owner. We also say that if a man sell, as his own, the property of another, and it be lost or perish after the sale ; the owner of the thing, may confirm the sale and claim the

(1) C. art. 1, p. 490.

price of the vender, whether it were sold in his name or not. (1)

LAW 55.

That the sale of a thing common to several, is valid, although it had not been divided.

Where two or more persons possess any thing in common, we say that each of them, may sell his part, though the thing had not been divided, either to one of his co-proprietors, or to a stranger. Yet if one of the co-proprietors will give as much for it, as the stranger, he ought to have the preference. But it is here understood that the sale can only be made to a stranger, before an action is brought for a partition of the thing; for after the suit is begun, it cannot be sold to him, until the partition is made, unless with the consent of the other co-proprietors. (2)

LAW 56.

Of him who, through fear or force, buys or sells any thing above or below its just value.

If a man buy or sell any thing through force or fear, the purchase or sale will not be valid ; but may, on the contrary, be rescinded, if it be proved that the force were so great, that he acted against his will. And though the sale were made under oath, or a penalty, or with a pledge, or security, it would not be valid. For in as much as the sale or purchase, the main object of the parties is void, so will be that which was

(1) *R. l. 2, tit. 16, b. 5.*

(2) *R. ll. 7, 8 & 14, tit. 11, b. 5.*

annexed to it, as an accessory. We likewise say that the sale may be rescinded, which is made for less than half the just price of the thing, at the time of the sale. And if the vender can prove this, he may compel the vendee to pay him over and above what he had given for the thing, the balance of what it was really worth, at the time of the sale : and if the vendee be unwilling to do it, he ought to abandon the thing to the vender, and take back the price he had given. And a thing is said to be sold for less than its just value, when it was worth ten maravedis, and was sold for less than five. We also say, that if the vendee can prove that he gave the just value of the thing, at the time of the sale, and more than half as much more, he may cause the sale to be rescinded, or the price reduced, as much as he had given over its just value ; (a) as where he had given more than fifteen maravedis for a thing worth only ten. And this recision the vender and vendee may sue for, while the thing is not lost, has not perished or been deteriorated : but afterwards, they can no longer, bring such action. We likewise say, that if the vendee or vender swear, at the time of the purchase or sale, that although the thing were worth more or less than they gave or took, they nevertheless renounce the right to sue for the recision of the sale : if the vender at the time he took the oath, were above fourteen years of age, he ought to observe it ; and cannot thereafter rescind the sale, on that account.

(a) This right of recision is denied to the buyer by art. 113, p. 266 of the Civil Code.

(a) But if he were a minor under fourteen years of age, the oath would not be binding, and he might annul the purchase or sale, as though he had not taken it. (1)

LAW 57.

That a fraudulent sale may be annulled.

If a man own an estate, a house, vineyard or any thing else, in another place than where he lives, and being ignorant of its value, having never seen it, nor wishing to sell it, and any person, through fraudulent motives, should prevail on him to sell it: we say that such a sale will not be valid, but may be rescinded, whether it were made for more, or less than the value of the thing. But if the owner wished to sell it, and the vendee acted fraudulently, by concealing something that belonged to the estate, or the thing sold: or fraudulently induced the owner to believe that, although certain things belonged to the estate, yet they were in the power of another; were difficult to recover, or were lost: then we say the sale would be valid, because the vender wished to sell. But the vendee would be obliged to indemnify him, for the fraud he had practised upon him, in such way that the seller should receive

(a) But now it would seem that a renunciation was not strengthened by the additional formality of an oath. Every person capable of disposing of his property, may freely renounce the benefit of all laws not made for the preservation of public order or good morals—c. art. 11, p. 4.

(1) *R. ll.* 1 & 2, *tit.* 11, *b.* 5—*C. art.* 9 & 12, *p.* 262—*ibid art.* 109, 110 & 111, *p.* 364 & 366.

the just price for the thing sold, together with its appertenances that had been fraudulently concealed. (1)

LAW 58.

That a sale may be dissolved, if the vendee does not observe the conditions annexed to it.

Men are sometimes induced, on account of the conditions of a sale, or of something promised them, to sell property which they would not otherwise part from. Wherefore we say, if any one sell any thing belonging to him, in consideration of such conditions; that they must, at any rate, be observed, according to their tenor, otherwise the sale may be rescinded. But if the sale were made differently and not on account of any specific condition; and after the vender and vendee had agreed thereupon, they had then annexed a condition; the sale would be valid and could not be rescinded, though the condition were not observed. Yet the obligor would be obliged to perform the condition annexed to the sale and pay all the loss and damage which the other sustained on account of the non-performance thereof. (2)

LAW 59.

Of him who secretly and fraudulently, buys the property of a person subject to pay taxes, with a view to deprive the king of his revenue.

Where a man liable to pay taxes; or where the debtor of the king secretly and fraudulently sells his property, with a view to deprive the king of the re-

(1) *R. l. 2, tit. 11, b. 5.* (2) *R. l. 2, tit. 16, b. 5.*

venue or rents, or debts that were due him, such sale would not be valid, but ought, in any event, to be annulled : and if the vendee made the purchase, with a knowledge of the fraud, he would be obliged to pay the king, out of his own estate, a sum equal to the price for which he had bought the said property. (1)

LAW 60.

That the sale made by a slave, of the property of his master, may be rescinded.

Where a man had constituted another his attorney, with power to administer all his estate ; and had afterwards instituted such attorney his heir, without his knowledge, while he was yet his attorney : if then the person who had thus made him his attorney and heir, should die, and one of the slaves of the deceased, had sold any part of the estate ; such sale would not be valid and the heir might annul it, as soon as he knew it, before the thing had passed into the power of the buyer. And this he may do notwithstanding he were present at the sale, and had been called, as a witness to sign the deed. And the reason is, that he did not know he had been instituted heir ; for had he known it, he might not have consented to the sale. But if the slave, from the station he held in the life time of his master, had been in the habit of selling for him ; though the heir may rescind the sale, for the reasons above mentioned, yet he would be obliged to reimburse the buyer, for all loss and damage he had sustained on account of the sale, out of the *peculium* of the slave, if any he had.

(1) *R. l. 11, tit. 10, b. 5.*

LAW 61.

That persons who repent of sales they had made, cannot annul them, although they may have obtained from the king letters to that effect.

We also say that though the seller may repent after the sale is made, and offer the buyer double the price he had given, to return the thing ; yet the sale cannot be rescinded on that account, nor can the buyer be compelled to it, against his wish. (1)

(No other part of this law in force.)

LAW 62.

Of those who wish to rescind the sales they had voluntarily made, alleging they were made through want.

If a man wish to rescind a sale which he had made of his own free will, alleging he did it through necessity, while pressed by hunger, or burthened with heavy taxes which he was obliged to pay, on account of the thing sold, or for any other like cause : we say such would not be sufficient reasons for rescinding the sale. So we say, where one wishes to rescind a sale, alleging that he had sold the thing, for less than its value ; it cannot, on that account, be rescinded. But it would be otherwise where the sale had been made for less than half the just value of the thing, as was before observed in the laws of this title : or where it could be proved it had been made through fraud knowingly practised by the buyer, when the seller was ignorant of

(1) *R. l. 2, tit. 16, b. 5.*

the true value of the thing, having never seen it, as we have above said. (1)

LAW 63.

Where a man sells a house, or tower subject to a service or tribute, and conceals it from the buyer, the sale may be rescinded.

Where the seller is silent and does not make known to the buyer, that the house or tower which he sells him, is subject to a service or tribute ; the buyer may, on that account, rescind the sale, and the seller will be obliged to restore the price, and pay him all the loss and damage he had thereby sustained. So we say, where a man sells a field or meadow which he knew produced noxious herbs, destructive to beasts that grazed on them, and he concealed this circumstance from the buyer, at the time of the sale ; the seller will be obliged to restore the price to the buyer, and pay him all the loss and damage he had sustained on that account. But if the seller were ignorant of that circumstance, at the time of the sale, then he would be obliged to restore the price only. (2)

LAW 64.

Of the vices and defects of a slave that is sold.

When a slave that is sold has any vices or defects ; as if he be a thief, or were in the habit of running away from his master, or had any other similar defect, to the

(1) R. l. 2, tit. 16, b. 5 — *ibid* il. 1 & 2, tit. 11, b. 5.

(2) R. l. 2, tit. 15, b. 5 — *ibid* l. *ibid* 3 — *Auto* 21, tit. 9, b. 3.

knowledge of the seller and he did not make them known to the buyer, he will be obliged to take back the slave and restore the price to the buyer and pay him for all the loss and damages he sustained on that account. But if he were ignorant of his defects, then the buyer must keep the slave, (a) and the seller restore so much of the price, as the value of the slave is diminished by reason of the defect. And so we say it would be, if the slave were badly affected with any hidden disease. (1)

LAW 65.

That the sale of a horse, mule, or other animal may be rescinded if the vender conceal their vices or defects.

When a man sells a horse, mule or other animal, affected with any bad disease or vice that diminishes its value; if he knew it at the time, he ought to have made it known to the buyer; and if he did not, the buyer may, at any time within six months after he had discovered it, return the animal to the seller, and compel him to take it back and return the price he had received. But if the buyer does not demand the price within six months, he cannot afterwards do it, and the sale will remain valid. Nevertheless the buyer may sue the seller at any time within a year, (b) to

(a) But by the Civil Code, the sale may be rescinded, whether the seller knew of the vices of the thing sold, or was ignorant of them, c. art. 71 and 72, p. 358.

(1) C. art 65, 66, 68, 78, 79 and 80, p. 356 and 358.

(b) The time of one year is reduced to six months by the Civil Code, art. 75, p. 358.

compel him to pay back so much of the price, as the value of the animal was found to be diminished, on account of its defect or disease. But after the expiration of that time, he can no longer institute any such suit. And the periods of six months and a year here spoken of, are understood to begin to run from the day of the sale. (1)

LAW 66.

That the sale of an animal, cannot be rescinded, if the seller openly declare its defects, at the time of the sale.

If the seller openly declare to the buyer, the disease of a slave or animal which he sells, and nevertheless the buyer being satisfied with the purchase, take the thing and pay the price, and afterwards wish to retract, he cannot do it, nor will the seller be obliged to receive the thing and return the price. And so it would be where they had mutually agreed upon the price, and the sale had been made under condition, that the buyer should not rescind it, whatever might be the defects of the animal sold. But if the seller declare generally that the animal has defects, concealing their real nature; or if he fraudulently mention them, in conjunction with others, so that the buyer be unable to perceive what they really were; he would then be obliged to take back the thing he had sold, and restore the price to the buyer, within the terms fixed in the preceding law. (2)

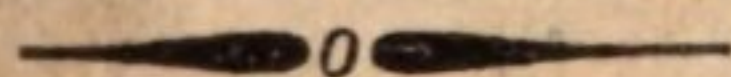
(1) C. art. 75 and 77, p. 358.

(2) R. l. 2, tit. 16, b. 5—*ibid* ll. 1 & 2, tit. 11, b. 5---C. art. 65, p. 356.

LAW 67.

Of the buyer who pledges a thing after he had bought it ; that it ought to be returned to the owner, if the sale be rescinded.

If the vendee, after he had bought any thing in any of the ways mentioned in the preceding laws, pledge it to another, and the sale be afterwards rescinded, for any of the above mentioned causes, the pledgee would be obliged to restore it to the seller to whom it belonged : but he might then demand of the person who pledged it, what he had paid him upon the pledge. So we say, where a man pledges any thing to another, under condition that he will not sell, give or, in any manner, alienate the pledge, until it should be redeemed : if thereafter he who pledged the thing, sell it, the sale will not be valid, and may, on that account, be rescinded.



TITLES,

Of the Roman and Spanish Laws, and of the Civil Code which relate to the title of LAS SIETE PARTIDAS, on Exchange.

Digest lib. 19, tit. 4. - - - - *De rerum permutatione.*

Digest lib. 19, tit. 5. - - - - *De præscriptis verbis et in factum Actionibus.*

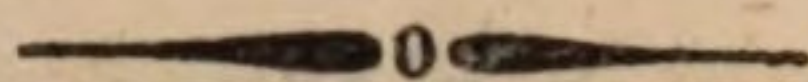
Code lib. 4, tit. 64. - - - - *De rerum permutatione et præscriptis verbis.*

Domat's Civil Law, part 1, b. 1, tit. 3.

Civil Code, book 3, tit. 7.

OF EXCHANGE.

What exchange is, and in what manner it is made	LAW 1
Who may make an exchange, and of what things it may be made	2
Of the effect of an exchange	3
In what manner an exchange may be rescinded, after it is made	4
Of Covenants called in Latin <i>contractos innomi- natos</i>	5



TITLE VI.

*Of the exchanges which men make with one another :
and what an exchange is.*

LAW 1.

What exchange is, and in what manner it is made.

Exchange is where one specific thing is given for another. And this may be done in three ways. The first, when it is made with the consent of both parties, with a promise of performance, as where one of them says to the other "will you exchange such a thing belonging to you, for such other thing belonging to me?" expressly designating both of the things by name : the other ought to answer, "I am willing and promise to make the exchange." The second is

where it is made simply by parole, without promise of performance, by saying only "I wish to exchange such a thing with you," and the other reply that he is willing. (a) By these and other similar words, an exchange is made, though the things exchanged were not in the presence of the parties, nor had passed under the power of either of them. The third is where it is made by parole and afterwards actually performed by both parties, or by one of them only. For in making such an exchange, any words will suffice, provided, it be done with the consent of both parties, and one of them receive the thing for which he gave his own in exchange. (1)

LAW 2.

Who may make an exchange and of what things it may be made.

Every person may make an exchange who, as we have said in the preceding title, can buy and sell : and we also say that they who are incapable of buying and selling, cannot make an exchange. We likewise say that every thing may be exchanged, which can be bought and sold ; and that those things which cannot be bought and sold, cannot be exchanged, except things spiritual which may be exchanged, but not bought and sold ; as one church for another, one dignity for another, one prebend for another, and the

(a) This form of contract by question and answer called *stipulatio* in Latin was abolished by the Leontine constitution. (See our note upon the law 2 of the title on promises and obligations.)

(1) *R. l. 2, tit. 16, b. 5.—C. art. 1 and 2, p. 370.*

tithes of one church for those of another. But the exchange of such and other like things, ought to be made with the consent of the prelate who has jurisdiction over the place in which are the things exchanged ; for if it be otherwise made, it will not be valid, as is said in the first part of this book, in the laws which treat on this subject. (1)

LAW 3.

Of the effect of an exchange.

An exchange made by parole, with a promise of performance, is of such force, that if one of the parties should wish afterwards to recant, the other who desires that it should be performed, may petition the judge to order the party refusing, to make the exchange, or to pay the loss and damage caused by his refusal to fulfil his contract. And these damages are called in Latin *interesse*. But if the exchange were made by parole only, by one of the parties saying to the other, " I wish to exchange with you such a house belonging to me," and the other only answer that he was willing, without making any other promise, as was above said ; then either of them may recant and cannot be obliged to accomplish an exchange made in that manner. But if it happen that one of the parties had, by his act, already begun to perform the exchange, by giving or delivering the thing he had promised in exchange ; while the other was not willing to give that which he had promised ; then we say it will be at the option of him who

(1) *R. l. 2, tit. 16, b. 5—ibid. l. 22, tit. 3, b. 1. C. art. 8, p. 370.*

had performed his promise, to recover back what he had given, or to sue the other for the loss and damages he had sustained on that account; which damages ought to be fixed and regulated by the oath of the person entitled to them, being previously assessed by the judge. (1)

LAW 4.

In what manner an exchange may be rescinded, after it is made.

When a man gives in exchange, any thing belonging to him, as a slave, or an animal, he ought to make known their vices and defects to the person with whom he exchanges. And if he knowingly conceal them, the exchange may, on that account, be rescinded, within the delay, and in the manner above prescribed respecting things sold under similar circumstances. We also say that an exchange may be rescinded for any of the causes for which we have said in the preceding title, the rescision of a sale, may be had. And we moreover say that they who make an exchange, are reciprocally bound to guaranty one another, for the things they give in exchange. (2)

LAW 5.

Of covenants called in Latin contractos innominatos, and which resemble exchange.

By *contractos innominatos* in Latin, are understood in common speech, those contracts which men enter into, that have no specific denomination: of these

(1) *R. l. 2, tit. 16, b. 5.* (2) *C. art. 4, 5, 6 and 7, p. 370.*

there are four kinds. The first, is where a man gives any thing belonging to him, for something else ; this is exchange of which we spoke in the preceding law. The second, is where one man gives any thing belonging to him to another, not that he might receive money for it, but that this other might do something for him, in return. In this case, we say that if he should not perform what he had promised, it will be at the option of him who gave the thing, either to demand it back, or to recover all the loss and damages he had incurred on that account, for the amount of which he ought to be believed under his oath, at the discretion of the judge. The third, is when a man does any thing for another, that the latter may give him something in return. And after he has done it, if the other should not give what he had promised, he may sue for it, on account of the fraud practised upon him and recover it, as we have above said, with all the loss and damages he had thereby sustained. The fourth, is where one man does any thing for another, in order that the latter may do something for him in return ; in which case, we say, that when one of the parties had done what he ought, he may require a like performance from the other, as well as recover from him all the loss and damages he had sustained on that account ; the amount of which ought to be estimated in the manner above prescribed. (1)

(1) *R. l. 2, tit. 16, b. 5.—C. b. 3, tit. 3, ch. 3, sect. 3.*

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
Merchants, Fairs and Markets.

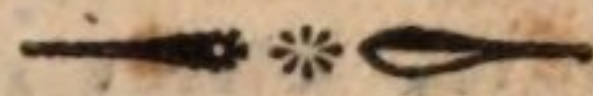
Fuero Juzgo, book 11, tit. 3.

Recopilacion of the Indies, l. 24, tit. 3, b. 6.

OF MERCHANTS, FAIRS AND MARKETS.

Of those who are merchants properly called - - LAW 1

Of the conventions and agreements which mer-
chants stipulate together, and of the associations
which they form under oath - - - - - 2



TITLE VII.

*Of merchants ; of fairs and markets ; and of the im-
post of the tenth part, and of the tolls which are
paid in this respect.*

LAW 1.

Of those who are merchants properly so called.

By merchants properly so called, are understood all
those who buy things of others, with the intention of
selling them again for the sake of the profits they
thereby acquire. And what merchants have to ob-
serve is this : they ought to conduct their business
honestly, without mixing with the things they have
for sale, others which adulterate and deteriorate them.

They should moreover be careful, not to sell knowingly one thing for another: and to make use of just weights and measures, such as are customarily used in the country or kingdom where they reside. And when they transport their merchandise from one place to another, they ought to pass along the ordinary roads, and to pay the tolls and taxes to those who are intitled to receive them; and if they contravene these provisions, they will incur the penalties prescribed in the laws of this title. (1)

LAW 2.

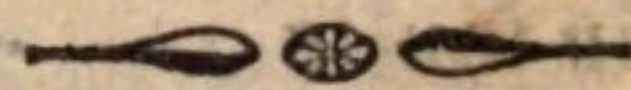
Of the conventions and agreements which merchants inter into and of the associations which they form under oath.

Merchants sometimes enter into covenants and agreements, and form associations under oath, promising to adhere to one another, and fixing among themselves, the price at which they will sell cloth by the ell, and other things by the weight or measure, and agreeing that they will not sell for a less price. So likewise artisans fix among themselves, the price at which they will sell the things they manufacture, in the way of their respective trades; and that no other person shall work at such trades, except those who are admitted into their fraternity; and that no member of the fraternity shall finish any work that had been begun by any other one of their members. They moreover sometimes agree not to instruct any other persons in their respective trades, except those who have descended from the members of the association. And

(1) *R. l. 3, tit. 5, b. 1.—l. 2, tit. 8, b. 9,—l. 2, tit. 11, b. 5.*

in as much as great evil may hence arise, we prohibit such combinations, conventions and agreements, as are above mentioned, or other similar to them, from being made without the knowledge and consent of the king; otherwise they will not be valid.

No other part of this law in force. (a)



TITLES,

Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on Letting and Leasing.

Digest lib. 19, tit. 2, - - - - *Locati Conducti.*

Institutes lib. 3, tit. 25, - - *De locatione et Conductione.*

Code lib. 4, tit. 65, - - - - *De locato et Conducto.*

Fuero Viejo, book 4, tit. 3.

Fuero Real, book 3, tit. 17.

Leyes Del Estilo, l. 250.

Domat's Civil law, part 1, book 1, tit. 4.

Civil Code, book 3, tit. 8.

OF LETTING AND LEASING.

What is meant by letting and leasing - - - -	LAW 1
Who can lease or hire, and for how long a time -	2
What are the things that can be let and hired -	3
When the lessee ought to pay the price of the thing taken on rent or hire - - - - -	4

(a) There are seven more laws in this title, none of which are translated, as they relate solely to the fairs and markets in Spain, and tolls and imposts paid on the transportation of goods from one place to another.

- That the owner of the estate or house may expel the lessee, if he be unwilling to pay the price he had promised - - - - - LAW 5
- That the lessee cannot be expelled from a house or shop which he had taken on rent, until the time be accomplished, except in certain cases - 6
- That the lessees of fields, vineyards, or other estates, are bound to repair the damages and injuries caused by their faults - - - - - 7
- For what causes the lessee is or is not bound to pay for the thing which he had leased or hired, when it dies or is lost - - - - - 8
- That where alcades, lawyers and other professional men die, before they had accomplished their undertaking, the wages due them, ought to be paid to their heirs - - - - - 9
- That gold smiths and other artificers are bound to pay for precious stones and other things which they break through their fault or want of skill - 10
- Of the wages which instructors receive from their scholars for instructing them in science; that they may chastise them so as not to maim them - - - - - 11
- That they who make a trade of dying silk and silk stuffs, or cloths, are bound to pay for the damage which happens through their fault - 12
- That he who freights his ship to another, ought to pay the damage happening to the merchandise, and other things that are lost through his fault - - - - - 13
- Of those who let casks or vases of a bad quality, or that are broken, to other persons, to put wine, oil or other similar things in - - - - - 14
- That shepherds and other persons who receive a price for taking care of flocks and herds of

- cattle, ought to pay the damage which happens to them, through their fault - - - - - LAW 15
- That master workmen and others who undertake work by the job, for a certain price, ought to pay therefor, if they execute it unfaithfully - 16
- That master workmen ought to execute the work they undertake, to the satisfaction of the owners 17
- That the thing ought to be returned to the owner after the expiration of the time for which it was leased - - - - - 18
- That the thing leased or let, may be sold to another person - - - - - 19
- That if the lessee hold the thing leased three days or more. after the expiration of the lease, he will be obliged to continue on the estate for another year - - - - - 20
- If they who let out estates or other things, trouble the tenants in the enjoyment thereof; or do not protect them; when they are able to do so, they shall pay all the damage sustained by such tenants - - - - - 21
- That the lessee is not bound to pay the rent he had promised, when the fruits of the thing let, are lost by accident - - - - - 22
- In what cases the lessee is bound to pay the rents notwithstanding the fruits of the thing leased, should be lost by accident - - - - - 23
- That the owner ought to account to the lessee for the amelioration made by the latter upon the thing leased - - - - - 24
- That the lessor of a store to put oil or other things in, is not bound to pay for the damage that happens thereto - - - - - 25
- That keepers of inns and hotels, and mariners are bound to pay for the things lost in their

- houses, or on board of their vessels by those
 whom they receive there - - - - - LAW 26
- That inn and tavern keepers ought to receive pil-
 grims, and take care of them and their effects - 27
- Of things which are taken in paying a quit rent
 (censo); who sustains the loss if they be des-
 troyed, and how the rent ought to be paid - - 28
- That if the tenant on a quit rent, wish to alienate
 the thing, he ought to sell to the owner in pre-
 ference to any other person, if he be willing to
 give the same price - - - - - 29

TITLE VIII.

Of Letting and Leasing.

LAW 1.

What is meant by letting and leasing.

Letting, properly so called, is where one man un-
 dertakes work for another, to be performed personally
 by him, or by his beast: or where one man grants to
 another, the right to make use of his things, for a cer-
 tain time, at a fixed price, to be paid in money: for if
 he take any thing but money, it would not be letting,
 but a *contractus innominatus*, as we have said in the
 last law of the title on Exchange. And farming out
 (*arrendamiento*) according to the Spanish language,
 means to let an estate, or the imposts, or any other
 thing, for a certain rent paid therefor. And there is

still another sort of letting, called freighting, which appertains entirely to the letting of ships. (1)

LAW 2.

Who can lease or let, and for how long a time.

Whoever has the right to buy and sell, according to what we have said under the title of sale and purchase, in the laws which speak of that matter, may likewise, rent and hire. But military men and the officers of the king's court ought not to take on rent, the fields or estates of other persons, as they may be thereby, prevented from performing the service they owe to the king. And letting and leasing may be effected in the same manner as sale and purchase, with the consent of both parties; whether for a certain time, or during the life of him who takes, or of him who lets the thing. And if a man let a house or other thing, for a certain time, and the lessee die before the expiration of that time, his heir may use the thing and profit by it, until the time shall expire; and he will be bound to pay the price for the thing let, which the deceased was to have given. We likewise say, that if the owner of the thing leased die, his heir will be bound to observe the contract which had been entered into by the deceased. We moreover say, that all contracts of letting or leasing which men stipulate with one another, will be valid, and ought to be observed; unless they should be

(1) C. art. 1, 2, 3, 4, *fi.* 372.

contrary to the laws of this book, or to good morals.
(1)

LAW 3.

What are the things that can be let or leased.

A man may let or hire the work of his own hands, or his beasts or ships to transport merchandise, or the right of using these, as well as all other things which men usually let or hire : so a man may lease the usufruct of an estate, of a vineyard, or other like thing, promising to pay for it, a certain price, every year. But if the lessee of an usufruct taken in this way, should die, the right of using the estate, will not pass to his heirs, but will revert to the owner : for the use of such an usufruct is of such a nature, that it expires with the death of the lessee. Nevertheless if the lessee had paid the whole or a part of the price of the usufruct, for the year in which he died, and had not enjoyed the usufruct itself ; the owner of the thing will be bound to restore to the heirs of the deceased, what he had received from him, for the year in which he died, or to permit them to gather the fruits for that year. (2)

LAW 4.

When the lessee ought to pay the price of the things taken on rent or hire.

The lessee or tenant ought to pay the price of the

(1) *R. l. 3, tit. 5, b. 7—C. art. 10, p. 374.*

(2) *C. art. 3, 41 & 55, p. 372, 380 & 382.*

thing he has rented or leased, according to the custom of each place, or at the time agreed upon, when he made the contract. And if there be no established custom in the place ; or if the parties had not agreed among themselves, as to the time of payment, then the lessee ought to pay at the end of the year. (1)

LAW 5.

That the owner of the estate or house may expel the lessee, if he be unwilling to pay the price he had promised.

If any one who has hired a house of another, should not pay the rents, at the time agreed upon, or at furthest, at the end of the year, as we have said in the next preceding law; the owner may then expel the lessee, without being liable to any fine or penalty. And we moreover say, that every thing found in the house, belonging to the lessee, will be bound for the rents due the owner of the house, and for the damage done to his house itself: (a) and the owner may retain them, as a pledge in spite of the tenant, until he pays the rents due, and repairs the damage he had done to the house. But the owner of the house ought not to seize upon the above mentioned things which he finds in the house, and retain them, as a pledge, unless he does it in presence of the neighbours and makes an inventory of all of them, in writing, in order that no fraud may be committed. And what we here say of houses,

(1) *R. l. 2, tit. 16, b. 5—C. art. 26, no 2, p. 376.*

(a) Si primus conductor alii locaverit, quod potest, res illata per se. eundem conductorem sunt obligatæ domino pro ea pensione, qua ipse tenetur primo conductori. Greg. Lopez.

is understood likewise to apply to estates, as well as to vineyards and gardens which are let or given, to be cultivated ; for every thing which the cultivator puts upon them, with the knowledge of the owner, will remain affected, in favour of the latter, who may retain them as a pledge, until the tenant pay the rent which he was bound to pay for the lease, in case he fails to make payment at the time he was to have made it. (1)

LAW 6.

That the lessee cannot be expelled from a house, or shop which he had taken on rent, until the time be accomplished, except in certain cases.

Where a man lease out a house, or shop to another, for a certain time, and the lessee pay the stipulated rent, at the time agreed upon ; the lessor cannot turn the lessee out before the time is expired, except in four cases. The first, is where the whole or a part of the house in which the owner resides, falls, or threatens to fall and he has no other into which he can go : (a) or where he has enemies in the neighbourhood in which he lives, or is pressed by other urgent necessity, on account of which he dare not stay there ; or where he marries off any of his sons or makes knights of them. The second is where such a defect is discovered in the house, after it is let, that it is in danger of falling, unless it is repaired. But in the two preced-

(1) *C art. 28, 40, p. 378—ibid art. 74. nos. 1 and 2, p. 468.*

(a) This provision of law appears to be repealed by art. 43, p. 389 of the Civil Code.

ing cases the owner of the house will be bound to furnish the lessee with another suitable house in which he can live, during the time the owner himself resides in the other ; or to make a deduction from the rents payable by the lessee, in proportion to the time. The third case, is where the tenant makes bad use of the house, doing damage to it, by which it is deteriorated ; or where he lodges women or men of bad lives in it, and disturbs the neighbourhood. The fourth, is where the lessee has taken the house for four or five years, engaging to pay a certain rent each year : for if he suffer two years to elapse, without paying the rent agreed upon, he may be expelled from the house. And for any of the above mentioned causes, the owner of the house may, before the expiration of the time agreed on, expel the lessee from the house against his will. (1)

LAW 7.

That the lessee of fields, vineyards or other estates, are bound to repair the damages and injuries caused by their faults.

Where a man leases fields, vineyards or other estates to another, the latter is bound to be vigilant, and preserve and cultivate them, in the same manner as if they were his own. And the labour he does on them, ought to be performed at such times and in such manner, that the trees and other things on the estate, or in the house rented, shall not be injured or sustain any deterioration thereby. And if he cultivate them badly,

(1) C. art. 22, 27, 28, 40, p. 376, 378.

or at a time when he ought not ; or if the thing he had taken on rent, be deteriorated, whether through his fault, or the fault of those whom he employed to labour for him ; we ordain that, if it should be really found, that the thing had been deteriorated, through his fault or negligence, he shall pay the whole amount of the damage, under the discretion of the judge of the place, and that of good men skilled in the cultivation of the earth. And so we say it would be where the lessee had enemies or evil wishers, who, through their malice towards him, should cut the trees or do other damage to the estate. (1)

LAW 8.

For what causes the lessee is, or is not, bound to pay for the thing which he had leased or hired, when it dies or is lost.

If any one undertake to transport for another person, either on his back, or upon his beast, or in a cart or ship, wine, oil, or other similar things, in bottles, pots or casks ; or pillars of marble, or glass vessels, or other similar things : and in transporting them, from one place to another, they fall and get broke or lost, through the fault of the carrier, he will be bound to pay for them. But if he take as much care as he can, in transporting them ; or if they get broke by accident, without his fault ; then he will not be bound to pay for them. Likewise we say, that if the thing hired, be lost, or deteriorated, or die by accident and without the fault of the lessee : as where it is a slave, or a beast, and it

(1) C. art. 26 & 35, p. 376, 378.

die a natural death ; or a ship that is lost in a storm by which it is overtaken ; or a house, and it get burnt, or a mill which is carried away by the swelling of a river ; or where any other similar thing get lost or die, through such accidents as are herein mentioned, the lessee will not be bound to pay for the value of the thing hired, except in certain determinate cases. The first is, where the lessee agrees with the owner, at the time he hires the thing, that he will pay for it, no matter what might happen to it. The second is, where the lessee delays to return the thing to the owner, longer than he ought to, and it get lost or be deteriorated after the time had elapsed at which it was to have been returned. The third is, where the accident which causes the loss or death of the thing, happens through the fault of the lessee. (1)

LAW 9.

That where alcades, lawyers, and other professional men, die before they had accomplished their undertaking, the wages due them, ought to be paid to their heirs.

When the judges of the king's court, and the other officers of his house, and the teachers of science, who receive certain wages, by the year, of the king, or of the corporation of any city or town, have begun the exercise of their respective functions, and die before the year is completed ; then their heirs ought, on account of the time the deceased had served, whatever it may be, to receive all the wages due them for that year, in the same manner as if the deceased had served the

(1) C. art. 35, 36, 37 & 63, ff. 378, 384.

whole year : and this because it did not depend upon the will of the deceased to accomplish and perform his duty, which he was prevented from performing by an accident it was not in his power to avoid. Yet if a lawyer agree with any person, to plead his cause, and do not follow it up, until it be finished ; he will not be entitled to receive the whole of the fee (*salario*,) though he may have commenced the cause : but on the contrary, if he die after the cause is began, his heirs ought to have such a portion only of the fee, as it may appear the deceased really deserved, and no more. Nevertheless if the heirs be willing to procure another lawyer capable of prosecuting the suit to a close ; the client ought to accept of him, and then he ought to pay the whole of the fee to the heirs. And so we say it would be, with respect to artisans who should agree and promise to execute any work, for a certain price, and die before they had finished it ; that their heirs ought to have what the deceased had earned, and no more. But if they wish to recover the whole of the price, they ought to procure other artificers, as skillful as the deceased, to finish the work. (1)

LAW 10.

That gold smiths and other artificers are bound to pay for the precious stones and other things, which they break through their fault, or want of skill.

Men sometimes wish to make themselves appear skillful and wise in things in which they are not, so

(1) *R. ll.* 11 & 18, *tit.* 16, *b.* 2—*C. art.* 74, 75, *p.* 386.

that persons who do not know them, confide in them, and thereby sustain damage. We therefore say, that if a goldsmith receive a precious stone from any one, to set in a ring, or in another thing, for a certain price, and he break it in setting it, through ignorance, or through any fault of his own; he ought to pay its estimated value, as fixed by good men skilled in such things. But if he can clearly shew that the accident did not happen through his fault, and that he is, as well skilled in his art, as men of the same trade usually are, and that the damage happening to the stone, was owing to some defect in the stone itself, such as a flaw or fracture; then he will not be obliged to pay its value, unless at the time he received the stone, he agreed with the owner, that he would pay for it, in whatever manner it might be broken. And what we say of goldsmiths, is understood likewise of other master workmen (*maestros*), as also of physicians, surgeons, horse farriers, and all other persons who receive a price for their work, or for *treating* any disease, if they err therein through their fault or want of knowledge. (1)

LAW 11.

Of the wages which teachers receive from their scholars for instructing them in sciences; that they may chastise them, so as not to maim them.

Masters receive wages from their scholars for instructing them in the sciences, and artisans from their apprentices, for teaching them their trades: each ought therefore to instruct faithfully and chastise with

(1) *R. 3, tit. 11, b. 5.*---*ibid l. 106, tit. 13, b. 7.*—*C. art. 63, p. 384.*

moderation those whom they have in charge for that purpose. The chastisement ought to be inflicted with reason and circumspection, so that the pupils or apprentices may not be maimed, or their lives endangered from the blows they receive from their masters. Wherefore we say that if any one violate this law and wound the person whom he instructs, so that he die, or remain maimed, and such person be free, the master shall make amends for his offense, according to the discretion of the judge and of good men. And if the person injured be a slave, the master shall make amends to his owner, by paying his estimated value, if he should die of the wound, together with all the loss and damage sustained on that account. And if the slave should not die, but remain maimed, the master shall pay as much as the value of the slave, is thereby diminished, together with the damage sustained on account of the wound. (1)

LAW 12.

That they who make a trade of dying silk and silk stuffs, or cloths, are bound to pay for the damage which happens through their fault.

If a man receive silk, or silk-stuffs, or linen cloth or other similar thing, to dye, wash or sew, and knowingly, or through error, exchanges them, by giving them to other persons as being their own ; or if they get lost, or be deteriorated by being torn, or by being damaged by rats, or by any other act caused by his fault ; he will be obliged to return, as much more of

(1) C. art. 7, 9, and 10, p. 36, 38.

the same kind of stuff and equal in quality to that which he had received, or the estimated value thereof, according to the discretion of the judge and of good men skilled in such matters. (1)

LAW 13.

That he who freights his ship to another, ought to pay for the damage happening to the merchandise, and other things that are lost through his fault.

If a man freight his ship or any other vessel, and after he put the merchandise or other things for which he had freighted it, on board, he set sail, without being sufficiently skilful for that purpose, before the master of the vessel comes whose duty it is to take command of her: or if the master be present and the owner be unwilling to obey his orders or to follow his advice, and the ship be endangered or lost, the owner will be responsible for the damage or loss sustained by the merchandise, as it happened through his fault, in attempting to do what he did not understand: wherefore he will be obliged to pay the amount thereof to the person to whom he had hired the ship. And so we say it would be if the owner of the ship should put the merchandise on board of another vessel not as good as the one he had freighted; taking them out of his own vessel, without the knowledge, or approbation of the merchant who had freighted her: so that if the ship in which the owner of the vessel put the merchandise, should perish, the loss will be his and not that of the merchant. (2)

(1) *R. l. 3. tit. 11, b. 5—l. 106, tit. 13, b. 7.* (2) *R. l. 3, tit. 11, b. 5.—ibid l. 106, tit. 13, b. 7.*

LAW 14.

Of those who let casks, or vases of a bad quality or that are broken, to other persons to put wine, oil, or other similar things in.

Where one man hires to another, casks or vases of a bad quality, or that are broken, to put wine, oil or other similar things in : if whatever is put therein, should be lost or deteriorated, through the badness of the vessels, and he who hired them, was ignorant of their defects, at the time he took them ; the owner of the vessels will be bound to pay the lessee for the damage and loss he sustains by their defects, notwithstanding the owner were ignorant of their bad qualities, or that they were broken : and this because every man ought to know whether the thing he lets, be good or bad. Wherefore we say that if one man let to another, woodland or meadows to pasture his cattle and beasts upon, and the lesser knows that they produce poisonous herbs which kill or injure the cattle that graze there, he ought to declare it openly to the lessee, or he will be bound to pay him, all the damage and loss he may sustain, on account of such poisonous herbs. But if the owner were ignorant that such herbs grew there, he will not be bound to pay the loss and damage ; but we say he shall not claim any rent, nor will the lessee be bound to pay any. (1)

(1) C, art. 19, n. 374, 376.

LAW 15.

That shepherds and other persons who receive a price for taking care of flocks and herds of cattle, ought to pay the owners, the damage which happens to them, through their fault.

Shepherds and other persons who receive wages from the owners, for keeping their flocks, ought to be vigilant, and to endeavour all in their power, to take care of them well and faithfully, so that they be not lost or injured, in any way whatever, by their neglect. They ought to search the most convenient and best places where they knew that good pasture and water can be had, and convey their flocks thither, according to the seasons of the year, so as to avoid the cold and snows of winter, and the summer heats. And they who violate this law, in not bestowing all the care in their power, as is above said, will be obliged, each of them respectively, to pay the owners of the flocks, all the loss which happens through their fault. And if any of them, should pretend that the damage sustained by the flocks, did not happen through his fault, and that he bestowed all his care to prevent it, he ought to be heard; and if he prove the manner in which the loss happened, by any certain indications, (*señales ciertas*), or in any other way, and swear to the truth of it, he ought to be excused, and he will not be responsible for what he proves and swears to: unless the owner of the flocks, can shew that the accident happened through the fault of the shepherd, for then the oath ought not to be deferred to the latter. (1)

(1) *R. l. 4, tit. 14, b. 3.-- ibid. l. 21, tit. 18, b. 6.*

LAW 16.

That master workmen and others who undertake work by the job, for a certain price, ought to pay therefor, if they execute it unfaithfully.

Master workmen and others, sometimes undertake work by the job, for a price certain ; and from a desire to finish it speedily, execute it unfaithfully, or not in the manner in which it ought to be done. We therefore say, that if any person undertake by the job, to build a castle, or tower, or house, or other similar thing, and build it hastily, or execute the work unfaithfully in some other way, so that it fall down before it is finished, he will be bound to build it anew, or to return the owner the price he had received, and pay him moreover all the loss and damage he has sustained, on that account. And if the work does not fall before it is finished, and the owner suspect that it is unsolid, and not faithfully executed, he ought to call on good and skilful men, and shew it to them ; and if they think it badly done, and discover that the defect arises from the fault of the architect, he ought to build it anew, or return the price he had received, and pay the owner for all the loss and damage he had sustained, as is above said. But if such skilful men called to view the work, think that it is not executed in bad faith, and that the architect is not in fault ; but that it was deteriorated since it was finished, or during the time it was building, by some accident, such as very great rains, inundations of waters, or by an earthquake, or other similar cause ; then the architect will not be

obliged to rebuild it, nor to return the price he had received. (1)

LAW 17.

That master workmen ought to execute the work they undertake, to the satisfaction of the owners.

Master workmen sometimes undertake to execute work to the satisfaction of the owners, by saying that they will do such a work, and that the owner shall be pleased with it, when he sees it. Therefore we say that if the architect who undertakes work by the job in this way, execute it faithfully, and the owner, when he sees it finished, maliciously pretends that he is not pleased with it, in order that he may withhold the price which he was to give for it, or suspend payment in some other way ; such obligation shall avail him nothing. For the agreement that the work should be done to the satisfaction of the owner, ought to be so understood, that the owner should be content with it, if it be executed in a manner to please other good and skilful men. If therefore such skilful men to whom the work is shewn, declare that it is well done, the owner cannot, in virtue of his contract, harass the architect, nor withhold the price he was to give ; but on the contrary, we say that the judge ought to compel him to pay it. We likewise say, that if a man undertake any work by the job, under a contract that he will execute it in such way that it shall remain at his

(1) *R. l. 3, tit. 11, b. 5—l. 106, tit. 13, b. 7—C. art. 71, p. 384.*

risk, no matter in what manner it may be destroyed or fall down, until the owner shall say he is pleased with it : and after it is completed, the architect call upon the owner to come and see whether he is satisfied with it ; and the owner, in order to make delay, answer that he does not wish to see it, or if he see it, he should refuse to say whether he was pleased with it or not, notwithstanding the work was well done, and it afterwards get destroyed, or fall down by an accident not proceeding from the fault of the architect, nor from any defect in the work itself ; then the loss will be on account of the owner, and not of the architect. We moreover say, that if the owner should be satisfied with the work, and it afterwards fall down or be deteriorated, the risk will be on his account and not that of the architect.

LAW 18.

That the thing ought to be returned to the owner, after the expiration of the time for which it was leased.

The thing ought to be returned to its owner, after the expiration of the time for which it was let or leased. And if the lessee should be obstinate and unwilling to restore it, as is herein said, until judgment be rendered against him, he shall then restore the double of it to the lessor or his heirs : and moreover if any damage happen to the thing through his fault, he shall pay therefor.

LAW 19.

That the thing leased or let, may be sold to another.

If after having let or leased a house or other estate,

for a certain time, the owner should sell it before the time has elapsed, the purchaser may expel the tenant ; (a) but the vender who had leased it, will be bound to return to the lessee, the rents, in proportion to the time he ought to have enjoyed the thing. But there are two cases in which the lessee cannot be expelled from the thing leased, notwithstanding it should be sold. The first, is where the buyer agreed with the seller, at the time of the sale, that he would not expel the tenant, until the lease had expired. The second, is where the seller had leased the thing for the whole life of the lessee, or for ever, as well for himself, as for his heirs. In each of these cases the owner cannot sell the estate so as to expel the lessee, but on the contrary we say that the agreement entered into between them, must be observed. (1)

LAW 20.

That if the lessee hold the thing leased three days or more, after the expiration of the lease, he will be obliged to continue on the estate for another year.

Where one man rents of another a wheat field, a vineyard, garden or other similar thing, to cultivate and gather its fruits, for a certain time ; and after the expiration of such time, he continue in possession of it, during three days or more, without delivering it to the owner, he will be presumed to have leased it for the following year : and he will be bound to pay the

(a) This provision of law has been repealed by the Civil Code, p. 380, art. 44.

(1) *R. l. 2, tit. 16, b. 5.—C. art. 44, 46, 47, 48, 49, p. 380.*

same rent for it, that he had given during one of the preceding years. But this would not be the case where the thing leased is a house, tower, or other edifice; for then the lessee will be obliged to pay for the overplus of the time he stays, or lives there, in proportion to what he had paid for the time past. And the reason is, that there is a difference between the renting of a house and an estate: for it may happen that the time during which the tenant keeps the estate over what he ought to do, is at such a season of the year, that the owner cannot afterwards find a person to whom he can let it, and may thereby lose his rents, and the crop of that year: whereas with respect to houses, it is otherwise, for they may be used and let at all seasons of the year. (1)

LAW 21.

If they who let out estates or other things, trouble the tenants in the enjoyment thereof; or do not protect them, when they are able to do so, they shall pay all the damage sustained by such tenants.

Men sometimes take estates, vineyards, gardens or other similar things on a lease, as they do houses, towers, and other buildings, on rent; and are thereafter disquieted in their possession, so that they cannot derive any advantage from them; we therefore say that if the owners of such things, or if any other person whom they can prevent, should, in any manner, disturb those to whom the things were leased or rented, so that they could not use or profit by them;

(1) *C art. 14 and 15, p. 374.*

then the owners would be bound to pay for all the damage and loss sustained on that account, as well for all the profits that might have been derived from the things leased or rented, if the tenants had not been disturbed in the enjoyment of them. But if the disturbance proceeded from strangers and not from the owners, nor from those whom they could have prevented: (a) if they who cause the disturbance have any just title for so doing; as if they be the owners of the thing let, or if it had been pledged to them, or they have any other right which would authorise them to interfere: then we say, that if the lessors knew of that circumstance, they will be bound to pay the lessees for all the loss and damage they thereby sustain, as well as for the profits they might have made, according to what we have said in cases where the disturbance proceeds from the owners. But if the lessor did not know at the time he hired or leased the thing, that any other persons had a right thereto; then he will not be bound to pay any more than to restore to the lessee what he had received on account of the rent; and if he has received nothing, the tenant or lessee cannot demand any thing of him. But if the lessee had incurred any expense in cultivating or repairing the thing let by which its value was augmented; then they who cause the disturbance, will be bound to reimburse such expenses, according to the discretion of the judge. And what we say in this law, is understood where the lessee acted in good faith at

(a) As their servants or other persons under their power. Gregorio Lopez.

the time of the lease, believing that the lessor had a right to hire or lease the thing ; for if he acted in bad faith, knowing that the thing belonged to another person, then he would have no right whatever to demand any thing, in that respect, of the lessor. (1)

LAW 22.

That the lessee is not bound to pay the rent he had promised, when the fruits of the thing let, are lost by accident.

If the fruits of the estate, vineyard, or other similar thing which had been leased, should be destroyed or lost by any extraordinary accident ; as by an inundation of a river, heavy rains or hail ; or should be destroyed by fire, an incursion of an enemy, or by a tumultuous assembly of men, or by excessive heat, winds, locusts, or other insects which consume them, or by any other similar accident by which the whole of the fruits were lost ; then we say, that the lessee will not be bound to pay any part of the price of the rents he had promised : for it is but just, that since he loses the seed he had sown, as well as his labour, that the owner should lose the rents he was to receive. But if all the fruits happen not to be destroyed, and the tenant gather any part of them ; then he will have the choice, either to pay the whole of the rent to the landlord, if he can venture to do so ; or to reimburse himself for the expenses he had incurred in cultivating the estate, and to abandon the overplus to the owner of the thing leased. But if the lessee lose the fruits, through

(1) C. art. 17, 24, 25, 28, p. 374, 376 & 378.

his own fault, as by badly cultivating the estate ; or by suffering it to be overrun by weeds and thorns which destroy the crop ; or if the fruits waste away of themselves, or through his want of attention to them ; in these cases, the risk will be on account of the lessee, and he will be obliged to pay the rents according to promise. (1)

LAW 23.

In what cases the lessee is bound to pay the rents, notwithstanding the fruits of the thing leased, should be lost by accident.

When the fruits of the thing let, are lost by any fortuitous event, the lessee will not be bound to pay the landlord, the rents he had promised, as we have above said. But there are cases in which it is not so. The first, is where the lessee promises at the time of making the lease, to sustain the loss, by whatever accident the fruits might be destroyed. The second, is where the lessee take the estate to cultivate it for two years, or more ; for if the fruits of one year should get lost, by any of the accidents mentioned in the foregoing law, and so much thereof had been gathered during the preceding or succeeding year, as, at a fair estimation, would suffice to pay the rent and the expenses of culture, during the two years, then the lessee will be bound to pay the rent : and notwithstanding the owner of the estate had released him, from paying the rent for the year in which the fruits were lost, yet if in the succeeding year he should gather as much as would suf-

(1) C. art. 54, p. 380.

fice to pay for both years, according to what is above said, the owner may demand the rent for the year for which he had so released him. We likewise say that if the estate or thing rented, happen to yield so abundantly in one year, as to double what it usually produces one year with another ; that then the tenant ought to pay double rent, if the superabundance arose from accident, and not from his industry, or extraordinary labour, or from other ameliorations which he made upon the thing let. For it is but just, that since the loss happening by fortuitous event, is sustained by the owner, that he should likewise enjoy the benefit arising from the same cause. (1)

LAW 24.

That the owner ought to account to the lessee, for the ameliorations made by the latter upon the thing leased.

Tenants sometimes ameliorate the estates and other things which they rent, by labouring and putting new works thereon, or by planting trees or vineyards there, so that the thing leased produces greater rent, at the time they return it to the owner, than when they took it: it is therefore but just that since they are obliged to pay for the damage they do to the thing rented, that they should be recompensed for the ameliorations they make upon it. Wherefore we say that the owner is bound to pay them, the expenses they had incurred on account of the thing ameliorated, or to deduct them from the price of the rent; unless it had been stipulated in the contract of lease, that the

(1) *C. art. 54, p. 380.*

tenant, should, at his own costs, do the work and make the ameliorations above mentioned ; for then the lessee will be obliged to observe the contract, as it had been stipulated.

LAW 25.

That the lessor of a store to put oil or other things in, is not bound to pay the damage that happens thereto.

Where one man lets to another, a store to put oil, or other similar things in : if the lessor does not promise, at the time of the letting, to take care of what was put in the store, and any damage happen to the lessee's things, the owner of the store will not be responsible therefor, unless it can be proved that it happened through his fraud or fault. But if the owner of the warehouse, had placed his servant or a stranger there, to take care of the things, then he will be bound to carry such servant or stranger before the judge that he may interrogate him and learn how the loss happened. But if, at the time the owner let the warehouse, he take upon himself the care of the things put therein ; in that case, he will be bound to pay for all that may be lost : unless the loss happen through a fortuitous event, without his fault ; as by fire, by the breaking in of thieves, or by the enemy or other similar cause.

LAW 26.

That keepers of inns and hotels, and mariners, are bound to pay for the things that are lost in their houses or vessels, by those whom they receive there.

Military men, merchants, and other persons who

travel, are often obliged to stop at inns and taverns, and deliver their effects into the care of those whom they find there, trusting to them without witnesses, or any other security : so they who travel by sea, put their effects in the ship in the same manner, trusting to the mariners : and as it often happens that among that class of men, there are some of but little honesty, who cause great loss and damage to those who confide in them ; it is proper that their knavery should be restrained by the fear of punishment. Wherefore we ordain that every thing which travellers either by sea or land, put into inns or taverns, or ships that navigate the sea or rivers, to the knowledge of the owners thereof, or of those who act in their places, shall be taken care of, so that no loss or damage happen to them : and if they get lost through their neglect, or fraud or other fault ; or if they be stolen by any person who come with the travellers ; then such owners will be bound to pay for every thing that is lost or damaged ; for it is but just, that since travellers confide to them their persons and effects, they should honestly and faithfully take care of them, so that they sustain neither loss or damage. And what we say in this law, is understood of hotel and inn keepers, and of owners of vessels who are in the habit of publicly receiving persons for hire or for a price. And so we say, that they would be bound to take care of those whom they receive, through friendship and without price ; except in certain determinate cases. The first is where they tell the traveller before they receive him, to take care of his own effects, as that they would not be responsible for them, if they should get lost. The

Second is, where they shew him, before they receive him, a trunk or chamber, saying, "if you choose to stay here, put your things in that trunk or room, and take the key into your own keeping." The third, is where the effects are lost by some fortuitous event; as by fire, an inundation of a river, the falling down of the house, the loss of the ship, or by an incursion of the enemy: for whenever they get lost by any of these events which does not happen, through their fraud or fault, they will not be bound to pay therefor. (1)

LAW 27.

That inn and tavern keepers ought to receive pilgrims and take care of them and their effects.

(Not in force.)

LAW 28.

Of things which are taken on paying a quit rent (censo); who sustains the loss if they be destroyed, and how the rent ought to be paid.

Contractus emphyteuticus in latin, means in common speech, a contract or stipulation by which an immoveable thing (*cosa rayz*) is given upon a specific rent, for the whole life of the lessee or of his heirs, or for each year, accordingly as the parties shall agree. This contract must be made with the consent of both parties, in writing, otherwise it will not be valid: and moreover, all the provisions contained in the agreement, ought to be observed. And as this contract

(1) *R. l. 7, tit. 11, b. 7.—C. art. 30, 31, 32, 33, p. 416.—ibid art. 61, p. 385.*

resembles more that of letting than any other, we shall speak of it in this title : and we say that if the thing given on a quit rent, should be wholly lost by accident ; as by fire, an earthquake, the overflowing of water, or by other similar cause ; the loss will be on account of the owner and not that of the tenant who, from that time, will not be bound to pay any more rent. But if the thing be not wholly lost by such accident, and at least an eighth part of it should remain, then the tenant will be bound to pay each year, the rent he had promised. And we moreover say, that where the thing let on a quit rent, belongs to the church, or a religious order, and the tenant suffer two years to elapse, without paying the rent, or three years where the thing belongs to a layman ; then the owner may take possession of it, without the order of the judge. If however, during the ten days next after the above mentioned periods of time, the tenant should be willing to pay the rent, without a law suit ; the owner ought to receive it, and not retake the thing leased. But if the tenant should not pay the rent during any of these delays, then the owner may take possession of the thing, notwithstanding he may not have demanded the rent himself, or any other person for him. For it is understood that the day of the term on which the rent was to have been paid, is equivalent to a demand, on the part of the owner, and a notice that the tenant should pay. (1)

(1) *R. l. 1, tit. 15, b. 5.*

LAW 29.

That if the tenant on a quit rent, should wish to alienate the thing, he ought to sell to the owner in preference to any other person, if he be willing to give the same price.

The tenant may sell the thing which he holds on a quit rent: but he ought first to inform the owner of his intention to sell, and of the price he is offered for it, and if the owner be willing to give the same price, then the tenant ought to sell to him in preference to all other persons. But if he declare that he is not willing to give the same price, or remain silent in that respect, during two months, without saying whether he were willing or not; the tenant may then sell it to whomsoever he pleases, and the owner cannot prevent him, provided he sell it to a person of whom the owner can obtain the rent as easily as of himself. We likewise say, that the tenant on a quit rent, may pledge the thing to a person able to pay the rent, as is above said, without the knowledge of the owner. And whenever the tenant alienates the thing, the owner thereof will be bound to permit the alienee to take possession of it, and to ratify the transfer by giving him a new title in writing. And for so ratifying the transfer and renewing the title, the owner cannot take more than the fiftieth part of the price for which the thing was sold, or of its estimated value, if it were given away. But the tenant cannot sell or pledge the thing to any other person from whom the rent cannot be obtained, as easily as from himself; as to a religious order, or to a person more powerful than himself: in that case, the alienation would not be valid, and the

tenant will lose thereby, all the right he had to the thing.

TITLES,

Of the Roman and Spanish Laws. and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
ships and shipwrecks, (*Pecio Dellos.*)

Digest lib 14, tit. 2, - - - - *De Lege Rhodia de jactu.*

Code lib. 11, tit. 5, - - - - *De Naufragiis.*

Domat's Civil law, part 1, book 2, tit. 9, sect. 1.

OF SHIPS AND SHIPWRECK.

What are the things that masters of ships and mariners, are bound to do and observe towards merchants and others who confide in them, -	LAW 1
That the agreements which merchants make with masters of vessels ought to be observed; and what authority the latter have over those who go in the vessel with them - - - - -	2
How the loss of merchandize thrown into the sea, in a storm, ought to be divided - - - - -	3
That merchants ought to divide among themselves, the loss of the mast when it is cut away to avoid the perils of a storm - - - - -	4
For what reasons merchants are not bound to divide among themselves, the loss of the ship, when it is wrecked on rocks or the land; and in what cases they are not excused therefrom -	5
That the loss of a thing thrown overboard ought to be divided, notwithstanding the vessel may be afterwards wrecked by accident - - - -	6

- That things found on the sea shore, which had
been thrown there by the wreck of a vessel,
ought to be restored to their owners - - - - LAW 7
- That the loss ought to be divided, which happens
to goods put on board of small boats, in order to
unload and lighten vessels, on their entering in-
to ports - - - - - 8
- That masters of vessels are bound to pay mer-
chants for the losses which happen to them,
through the fault of the former - - - - 9
- What penalty mariners deserve, who knowingly
cause a vessel to be wrecked, that they may
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on board of her - - - - - 10
- Of fishermen who, by night, make signals with
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- That the loss occasioned by pirates, ought to be
divided among those who go in the ships - - 12
- In what manner merchants can recover their
things taken by pirates, if they should after-
wards be found, and in what cases they cannot 13
- That judges established near the sea shore, ought
to decide the disputes which arise between
merchants, in a summary manner - - - - 14

TITLE IX.

Of Ships and Shipwreck, (pecio dellos.)

LAW 1.

What are the things that masters of ships and mariners, are bound to do and observe towards merchants, and others who confide in them.

By pilots, masters, or patrons, are understood those who are placed in chief, over the government of ships. To them it especially belongs, to take care that the ship before she puts to sea, is well caulked, refitted, in good order, and well furnished, with all necessary rigging, such as sails, masts, ropes, spars, anchors and oars, and other things which appertain to ships, and which are necessary to each species of them. They ought moreover to take with them, such men as are skilful in assisting to guide, manœuvre and govern the vessel ; so that if they should not be prevented by tempests or storms at sea, they may go directly to their port or place of destination, without exposing the merchants or others who hire them, or their effects, to any danger or loss, through the fault of those who manage the vessel. They ought likewise to take with them, a scribe (*escriuano*) who knows how to read and write well, that he may note down in a register, all the things which every person brings on board, as well as their quality and nature. And this register will have such great force as to all the things that are written therein, that it will be entitled to the same faith and

credit, as a writing executed by the hand of a notary public. They are moreover bound to provide their vessel with arms, biscuit, water, and all other things necessary for their subsistence and that of the crew. They ought likewise to advertise the merchants and others whom they take with them in the vessel, to do the same, so that they also may provide themselves with the necessary water and provisions; as also with arms, as many as can, in order to defend themselves against corsairs, and other enemies, if occasion should require. (1)

LAW 2.

That the agreements which merchants make with masters of vessels, ought to be observed: and what authority the latter have over those who go in the vessel with them.

If the masters and owners of vessels, enter into any agreement or stipulation with the merchants, or with other persons whom they transport with them in the vessel; such agreements or stipulations we say, ought to be observed in every respect, as well on the one part as on the other. And if, after the vessel is gone out of port, any one on board, should commit a crime for which he deserves to be punished with death, or other penalty of body, or forfeiture of goods; neither the master or owner of the vessel, shall condemn him to suffer such penalty or loss of limb, or of goods: but they may seize and secure him, so that he cannot do harm or damage to any other person, and when they arrive at the port where they were to unload, they

(1) See R. laws of the tit. 10, b. 7.

ought to carry him before the judge of the place, and inform him of the crime he had committed. The judge ought then to hear the accused and those who complain of him : and after having heard the reasons of both parties, and the evidence of the crime alleged, he ought to condemn the accused to suffer such penalty as he thinks he deserves ; or to acquit him if he thinks he is not guilty. Nevertheless, masters and owners of vessels, may chastise their mariners and servants, with the whip, for the faults they commit, always taking care not to kill or maim them. (1)

LAW 3.

How the loss of merchandize thrown into the sea in a storm, ought to be divided.

They who navigate the seas, often encounter such great dangers, that they are obliged, from stress of weather, and from the fear of perishing or of being lost, to throw overboard, many of the things that are in the vessel, in order to lighten her and avoid destruction : and as such jettison, (*echamiento*) is for the common benefit of every person on board, we think it just, and we ordain, that all the merchants, as also all other persons who transport any thing on board of the vessel from which such jettison takes place, shall contribute to pay the owners, for whatever is thrown into the sea, for such a cause ; each one paying his portion, more or less, according to the value of what he has remaining in the vessel. And although one of them, may

(1) See *R. ll. of the tit. 10, b. 7—ibid l. 2, tit. 16, b. 5.*

have put on board, precious stones, gold or other money, or any other thing whatever, he ought to contribute according to its amount or value, and he cannot excuse himself, by saying that it weighed but little ; for in such cases, things are not to be appreciated according to their weight, but according to their value ; and moreover, not only are the merchandise and other things remaining in the ship, saved by the jettison, but the ship itself, which might have been lost, if it had not been lightened. We therefore think proper, and we ordain that the owners of the ship, shall estimate the value of the ship or other vessel from which the jettison was made ; and the merchandise and all other things remaining on board, being appraised, as is above said, they ought all in common, to divide among themselves, the loss of the jettison, and each one pay the part he is bound to contribute to the owners of the goods, deducting likewise the value of what each one may have lost by the throwing overboard of his own effects. And if any of the merchants should have slaves on board, he will be obliged to appraise them and pay for each of them, in the same manner as for the other things that remained in the vessel. But if there be freemen on board, who brought nothing but their persons, whatever may be their number, they will not be obliged to contribute for what was thrown overboard : for a freeman neither can or ought to be valued like other things. (1)

(1) See *R. laws of the title 10, b. 7.*

LAW 4.

That merchants ought to divide among themselves, the loss of the mast, when it is cut away to avoid the perils of a storm.

If the wind rise to a tempest at sea, and the master of a vessel, through fear of perishing, cut away the mast to avoid the effects of the storm ; or intentionally cut down the yards, together with the sails, and they fall into the sea and be lost ; such losses as these, the merchants and other persons on board the vessel, must divide among themselves, and pay for, in common to the owner thereof, in the same manner as we have said in the preceding law, they ought to pay for the goods that are thrown overboard to lighten the vessel ; but if the mast, or yards, or sails should not be cut away, by the order or with the knowledge of the master of the ship ; but be carried away by the violence of the wind, torn by lightning, or be lost by any other similar fortuitous event ; then neither the merchants nor any other person on board would be bound to pay any thing therefor, although their effects should remain safe in the vessel and free from loss. For, as they pay the price of the freight of the vessel, the loss which happens in this way, will be on account of the owners, and not of other persons. (1)

(1) See R. laws of the tit. 10, b. 7.

LAW 5.

For what reasons merchants are not bound to divide among themselves, the loss of the ship, when it is wrecked on rocks, or the land—and in what cases they are not excused therefrom.

If a vessel be driven by a tempest against rocks or the land, and be wrecked or foundered (*enarenasse*); notwithstanding the merchants should save their goods free from damage, they will not be bound to pay for the ship. But, if before the vessel is lost in this way, the merchants, through fear of losing both themselves and their effects, should order the owner of the vessel to let her run ashore, and trust to the mercy of God, declaring that if she should be wrecked, they were willing to contribute their part of the loss, and would aid in supporting it, if they should save enough out of the wreck to enable them to do so; if then the owner let the vessel run ashore, according to their request or command, and she be broken to pieces; they ought to appraise her value, as well as the things which each one saved belonging to him, and thereupon the owner and all the others ought to divide the loss among themselves, each one paying more or less according to what he may have saved from the vessel; and they who saved nothing, ought to pay nothing; and if the whole should be lost, then the owner of the vessel will have no claim in that respect against the merchants. (1)

(1) *R. l. 9, tit. 10, b. 7.*

LAW 6.

*That the loss of a thing thrown overboard, ought to be devid-
ed ; notwithstanding the vessel may be afterwards wrecked
by accident.*

They who travel by sea, are sometimes overtaken by storms, so that through fear of being lost, they have to throw overboard, some of the things that are in the vessel, in order to lighten her ; if afterwards the vessel should be wrecked by accident, as by striking against rocks, or the land, or in any other manner, so that what was left on board, fall into the sea, and some of the things should be then saved, the owners thereof will be bound to aid, in repairing the loss which they had sustained, whose goods had been thrown into the sea, for the common benefit of all, by estimating the value of those that were saved, and of those that had been thrown overboard, and then deviding the loss proportionally among themselves, according to such estimate. But if they whose goods had been thrown into the sea, in order to lighten the vessel, as is above said, should afterwards recover any of them ; they will not be bound to give any part thereof to the others who had lost theirs by the accidental wreck of the vessel, in the manner before mentioned. (1)

(1) *R. ll. 9, 10, tit. 10, b. 7.*

LAW 7.

That things found on the sea shore, which had been thrown there by the wreck of a vessel, or which had been thrown overboard at sea, ought to be restored to their owners.

When a tempest arises at sea, merchants and other persons, through fear of being lost, throw their merchandise overboard, in order to lighten the vessel : we therefore think fit, and we ordain that whoever finds any thing thus thrown into the sea, shall restore it to the owner, or to his heirs. And we moreover say, that if the vessel happen to be wrecked by a storm, or in any other manner, all that may be found of the wreck thereof, or of the things that were in it, by whomsoever they may be found, will belong to those who lost them : and we forbid any person from hindering the owners from obtaining them, notwithstanding any privilege, or custom, which confers on certain persons, the things that are brought into their ports, or which are found near a castle, or on the sea shore, or under any other pretext whatever : for we do not think it just that the things lost by such unfortunate accidents, should be taken from the owners, by any privilege or custom : unless however they should belong to the enemies of the king or kingdom, for then they will become the property of the first finder. (1)

(1) *R ll. 9 and 10, tit. 10, b. 7.—C. art. 13, p. 476.*

LAW 8.

That the loss ought to be divided, which happens to goods put on board of small boats, in order to unload and lighten vessels, on their entering into ports.

If, when a vessel arrive at the entrance of a port, or river, the master should fear that she was too heavily loaded, and that the entrance was too shallow or narrow, and he should, on that account, discharge a part of the cargo and put it into lighters or other small boats, that it might be conveyed with more safety : we say, that if any thing thus put into the boat, should be lost by its being wrecked, or by any other accident, the loss shall be divided amongst all the other merchants whose goods remained safe in the ship, in the same manner that we have prescribed in the next preceding law, where things are purposely thrown into the sea, in order to avoid the perils of a tempest. But if afterwards the vessel should be wrecked and every thing on board, get lost, while the things that had been put into the boats, as is above said, in order to lighten the vessel, remained safe ; the owners of the latter will not be bound to give any thing to those whose effects had been lost in the vessel, as the loss was the result of accident, and did not arise from any cause intended for the common benefit of all. (1)

(1) *R. ll. 9 and 10, tit. 10, b. 7.*

LAW 9.

That masters of vessels are bound to pay merchants for the losses which happen to them, through the fault of the former.

The loss of a vessel sometimes happens through the fault of the master, or of those who command it : as where they go to sea at a season not proper for navigation. This season is from the eleventh day of November, until the tenth of March : because during that time, the nights are long and the winds violent, and the sea is agitated by the winter weather ; and they who navigate during that season, are exposed to heavy storms, and great dangers. Wherefore, every master or commander of a vessel, who goes to sea, during that season of the year, against the wish of the merchant or person who has his effects on board, is guilty of a great fault, and in case of the vessel being wrecked, he will be bound to pay for all the loss and damage caused thereby. And so we say it would be, if the commander of the vessel knew that he had to pass through dangerous places, beset with enemies or other perils, and did not inform the merchant thereof : or where he confided the command of the vessel to the care of persons not sufficiently skilful for that purpose : for he will be bound to pay for all the damage that arises from any of these causes.

LAW 10.

What penalty mariners deserve, who knowingly cause a vessel to be wrecked, that they may appropriate to themselves, the things that are on board of her.

Great fraud and deception are sometimes practised by those who command and steer vessels; so that when they discover that they who are on board, carry great riches with them, they purposely go into dangerous places that the vessel may be lost, in order that they may steal and plunder such riches for themselves. Wherefore we say, that whoever commits such a crime, shall if it be proved upon him, suffer death. And the judge before whom the proof is made, shall cause to be paid, out of the goods of the condemned, the loss and damage which others had suffered by his offense. And we think fit, and we ordain, that they who have sustained such damage, shall, as to the amount thereof, be believed under their oath, it being first taxed according to the discretion of the judge.

LAW 11.

Of fishermen who, by night, make signals with fire, to cause vessels to be wrecked.

(Not in force)

LAW 12.

That the loss occasioned by pirates, ought to be divided among those who go in the ship.

If pirates who roam the seas, take a vessel, with the persons on board and their effects, and afterwards an

agreement be entered into, by which the pirates suffer the vessel to depart with those who are on board, together with their goods: the sum given in virtue of such agreement, ought to be divided among all, each one contributing his proportional part, more or less, according to the value of what he has on board. And if any one should have nothing in the vessel, but his person, he ought nevertheless to pay something, whatever may seem just: for it is no small advantage to have escaped with one's person from the power of the enemy. But if the pirates should not take possession of the vessel, but only rob her of a part, and not of the whole of her cargo; the loss will fall upon the owners of the things taken, and they cannot, on that account demand any thing of those whose effects remained in the ship. (1)

LAW 13.

In what cases merchants can recover their things taken by pirates, if they should be afterwards found, and in what cases they cannot.

Pirates sometimes take and plunder merchant ships and their cargoes, and before they leave the seas, or convey their booty to a place of safety, they meet with other christians who captured them. And as disputes may arise between those who had been robbed by the pirates and those who retook the vessel, to whom it belongs; we will explain in this law, the manner in which such a dispute ought to be decided. And we

(1) *R. l. 10, tit. 10, b. 7.*

say, that if the merchants were going to, or coming from a christian country, and were conveying provisions, or any other thing whatever ; then the vessel and every person and the things on board, ought to be restored to the primitive owners, from whom they had been taken by the enemy : and this because the merchandise thus transported by merchants, is for the common benefit of the country. But if merchants should be transporting merchandise to the enemy's country, at a time when there existed no truce between us, and without our command, and were captured and recaptured in the manner above mentioned ; every thing that may afterwards be taken from the first captors, will become wholly the property of the second ; except however the christians who are on board, whose persons shall remain free. And so we say it would be with respect to small vessels in which men go to sea, not with merchandise, but in order to amuse and divert themselves ; they likewise will belong to those who recapture them from the enemy who had taken them. For they who go to sea, in time of war, not for commercial or profitable purposes, or to fight the enemy, but idly and without any benefit to their country, must sustain the losses that befall them, as they happen through their own fault.

LAW 14.

That judges established near the sea shore, ought to decide the disputes which arise between merchants, in a summary manner.

(Not in force.)

TITLES,

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
Partnerships.

Digest lib. 17, tit. 2, - - - - - *Pro Socio.*

Institutes lib 3. tit. 26, - - - - - *De Societate.*

Code lib. 4, tit. 37, - - - - - *Pro Socio.*

Domat's Civil Law, part 1, b. 1, tit. 8.

Civil Code, b. 3, tit. 9.

OF PARTNERSHIPS.

What a partnership is ; what advantages arise from it, and by whom it can be contracted -	LAW 1
For what purposes a partnership may be con- tracted - - - - -	2
In how many ways a partnership may be formed	3
What are the agreements which partners may stipulate among themselves, with respect to profits - - - - -	4
What are the contracts entered into by partners, that are valid - - - - -	5
That the estates and gains ought to be common to all the partners, when the partnership in- cludes all the property they then have or hope to have thereafter - - - - -	6
How the profits and loss ought to be divided among the partners, when the partnership is formed for a specific object - - - - -	7
That he who has acquired gains by illicit means, is not obliged to divide them among his other partners - - - - -	8

What are the agreements that partners can or cannot make, relative to the estates which they expect to inherit - - - - -	LAW 9
For what causes a partnership is dissolved, after it had been contracted - - - - -	10
That a partner may quit the partnership, if he be not pleased with his partners - - - - -	11
How the loss and profit ought to be divided, when one of them withdraws from the partnership for his own benefit, and to the detriment of the others - - - - -	12
How the profits and loss are to be divided among the partners, when the partnership is dissolved for any lawful cause - - - - -	13
For what causes one partner may separate himself from the other, before the expiration of the time - - - - -	14
Where the partner who hold the partnership effects, falls into a state of poverty, what may, in that case, be required of him by his other partners	15
That the debts and expenses incurred by one of the partners for the benefit of the partnership, ought to be repaid to him - - - - -	16
That the things which men take out of the partnership effects, must be returned to the heirs of their co-partners - - - - -	17

TITLE X.

Of the partnerships (compañias) which merchants and other persons enter into, in order to acquire something, with more ease, by uniting their effects together.

LAW 1.

What a partnership is, what advantages arise from it, how, and by whom it can be contracted.

A partnership is the union of two or more men, made with the intention of acquiring something in common, by uniting themselves together. Great advantages arise from such union, where it is formed between good and honest men; for then they mutually assist one another, as if they were brothers. Partnership is formed by the consent and agreement (*otorgamiento*) of those who wish to become partners. And it may be contracted for a certain time, or during the lives of the partners. But if persons enter into a partnership, both for themselves and their heirs; the contract will be valid during their lives, but it will not pass to their heirs; unless the partnership had been made concerning certain things farmed from the king, or from the corporation of some town. And every man of sound mind, or who is not a minor under fourteen years of age, may enter into partnership with others. Yet if a minor under twenty-five years, conceive that he is prejudiced by a partnership, or that he had been fraudulently induced to enter into it; he may petition the

judge of the place, to release him from the partnership, and to restore him to the condition in which he was before, free from loss, and the judge ought to do it accordingly. (1)

LAW 2.

For what purposes a partnership may be contracted.

A partnership may be contracted for every thing that is lawful and just : as for buying, selling, leasing, hiring, and other like things by which gain may be lawfully acquired. But it cannot, and ought not to be contracted for unjust (*desaguisadas*) purposes ; as for stealing, robbing, killing, or for lending at usury ; nor for doing any other similar thing that is wicked, unjust, and contrary to good morals : for a partnership made for such purposes as these, would not be valid, nor could one partner claim any thing of another in virtue of such a contract. (2)

LAW 3.

In how many ways a partnership may be formed.

Partnerships may be contracted in two ways : the one, where the parties agree that every thing they then possess and shall thereafter acquire, shall be common among them ; and that the gain and loss arising therefrom, shall be equally divided among them all. The

(1) C. art. 1, 2 & 4, p. 388—*ibid* art. 19 & 20, p. 392—*ibid* art. 52, p. 400.

(2) C. art. 3, no. 4, p. 388.

other, is where the partnership is formed for a particular determinate purpose : as for selling wine, cloths or other like thing. And all the just and lawful stipulations entered into by the parties, in these two kinds of partnership, will be valid, and ought to be observed according to agreement. And if no stipulation be made as to the manner in which the profits and losses are to be devided ; then they ought to be equally devided. But if there be an agreement made as to the profits, without mentioning the losses ; it is then understood that each partner must support the same portion of the losses that he enjoys of the profits. And so we say it would be, where they make an agreement as to the losses, without making mention of the profits.

(1)

LAW 4.

What are the agreements which partners may stipulate among themselves, as it respects the profits.

It sometimes happens that among those who form themselves into partnerships, for the purposes of gain, there is one who is better informed in the art or business which is the object of the partnership, or who undergoes greater labour, or runs greater risks. If therefore the partners agree among themselves, that the one who is thus better informed and undergoes greater and more labour, shall have a greater share of the profits ; or that he shall not suffer any part of the loss sustained

(1) R. ll. 2 & 5, tit. 9, b. 5—*ibid* l. 6, tit. 10, b. 5—*ibid* l. 2, tit. 16, b. 5—C. art. 6, 7, 8, 9, 12, 13 & 31, p. 388, 390 & 394.

in the business in which the partnership is engaged ; such and other similar agreements will be valid, and ought to be observed in the manner in which they were contracted. But if they agree that one of them shall have all the profits without supporting any part of the losses ; or that he shall support all the losses, without participating any part of the gains, the contract would not be valid. And such a partnership as this, is called in law, *leonine*. (1)

LAW 5.

What are the contracts entered into by partners, that are valid.

If a man practise fraud to induce another to enter into partnership with him, and the contract be accordingly made ; from the moment the party detects the fraud, he will not be bound by the contract. We likewise say, that if two men enter into partnership, and one of them declare to the other, that although this other should commit fraud in their partnership business, that he would not nevertheless demand any thing therefor ; such a contract we say, would not be valid, nor ought it to be observed : for contracts which put men in the way of committing fraud, ought not to be valid. We moreover say, that if the partners agree, that each of them shall have such a part of the profits, or sustain such a part of the losses, as shall be fixed by a person they may designate ; and such person fix their respective portions justly and lawfully, they

(1) *R. l. 2, tit. 16, b. 5—C. art, 33, p. 394.*

ought to abide by his decision. But if he fix them unjustly ; as if he assign to one of them, a greater portion of the gain and loss, than to the other, without giving any good reason therefor : his decision would not be valid ; but ought on the contrary to be rectified, according to the opinion of good men, who will ascertain whether one of the partners deserves more than the other, as having been better informed, or having undergone greater labour in the partnership business, according to what we have said in the next preceding law. And if they find it to be so, they ought to assign to such partner, what they may think just ; otherwise they may order the partition to be made equally between the parties. (1)

LAW 6.

That the estates and gains ought to be common to all the partners, when the partnership includes all the property they then have, or hope to have thereafter.

If by the contract of partnership, the partners agree, that all the estate they then have, and all they may thereafter acquire, shall be joined together and be common to them all : we say, that from the day such a contract is signed (*firmado*,) all the gains, as well as all the property which the partners then have, or may have thereafter, of whatever nature it may be, shall be in common between them, even if it were *castrense*, or *quasi castrense peculium*. We likewise say, that

(1) *R. l. 2, tit. 16, b. 5.—C. art. 32, p. 394.*

each of the partners may make use of such estate, and institute suits therefor, in the same manner as for his own. But if one of them should have the lordship or jurisdiction over a castle, or a country ; or should have any thing to receive from his debtors, the other partners could not sue in this respect, nor exercise the rights of such jurisdiction, unless power had been given to them to that effect, by the partner who had a right to do so. (1)

LAW 7.

How the profits and losses ought to be divided among the partners, when the partnership is formed, for a specific object.

When men enter into a partnership, by simply saying, "let us be partners," without declaring or specifying that it is for the whole of their estates, according to what we have said in the preceding law ; it is then understood that they are to divide equally, all the profits they make by the trade or commerce they are then engaged in. We likewise say, that if they form a partnership for any particular purpose, as for selling wine, cloths, or other similar things ; they ought to divide the profits made during the partnership, in the same manner they may have agreed upon, at the time they entered into it. But the gains they may have acquired, in any other way, ought not to be divided between them, but will belong exclusively to him who acquired them. We moreover say, that the loss and

(1) *R. l. 2, tit. 16, b. 5—C. art. 8, p. 390.*

damages arising from the partnership, ought to be supported by each one, according to the profits he gets : unless such loss and damages had happened, through the fault or fraud of one of the partners, for then he alone must support them, and not the others. But if the partner, through whose fault, the loss or damage happened, can prove, that he had bestowed the same care, as if the things had been his own ; then he will not be obliged to pay for such damages ; on the contrary we say, that each of the partners ought to support his share of them. (1)

LAW 8.

That he who has acquired gains by illicit means, is not obliged to divide them among his other partners.

If one of the partners acquire any profits, by theft, robbery or fraud, or by other similar illicit means, the others ought not to take any part of them. And if he put them in partition with the other partners, and they receive a part of them ; and he who had acquired them, should be afterwards cast in a suit, and be obliged to restore them to their owners ; then each of the other partners, will be obliged likewise, to restore the part of the gains they had received, although they did not know, at the time they received them, that they had been acquired by unlawful means. We further say, that if the other partners knew, at the time they received their part of such gains, that they had been acquired by unlawful means ; in that case, although the

(1) *R. l. 2, tit. 16, b. 5—C. art. 31 & 32, p. 394.*

partner acquiring them, had not given to the others, the share falling to them ; yet these others would be obliged, on account of the part they had received, whatever it may be, to aid and assist the former in paying, out of the effects of the partnership, all that he may have to pay in that respect, in the same manner as if they had received their full and entire shares ; nor will the guilty partner be obliged to pay any more than the others : and this because the others, by receiving their part, consented and adhered to the offense their partner had committed.

LAW 9.

What are the agreements that partners can or cannot make, relative to the estates which they expect to inherit.

If a partnership be entered into, under condition, that the estate which the partners expect to inherit from a person expressly named in the contract, should be common between them, in whatsoever way they might inherit it, whether by institution of heir or otherwise : we say that such a contract would not be valid, in as much they mention by name, the person who owns the estate : unless however, it had been made, with the consent of such person who continued in the same mind until his death : for it may happen that some of the partners may attempt his life, through a desire to divide his estate between them : wherefore we declare, that a contract from which such great evil may arise, shall be of no effect. But if at the time of signing the contract, the partners had stipulat-

ed, that al! the estate whatever that might descend to them, from a succession which they hoped to inherit, without naming, or otherwise indicating the person from whom they expected to inherit, should be in common between them all ; in that case, the contract would be valid, and each partner will be entitled to his share of the gains.

LAW 10.

For what causes a partnership is dissolved after it had been contracted.

Partnerships are dissolved in many ways ; and first by the natural death of one of the partners ; for although there should be many of them, yet the partnership is dissolved by the death of one only of them ; unless they had agreed at the time they entered into it, that although one of them, should die, the partnership should nevertheless continue as to the others. We moreover say that if one of the partners should be banished for ever to an island, the partnership would be thereby dissolved : for such banishment is called in latin, civil death, (*muerte civil*) ; and properly so called, because the exile can never depart from the place to which he is sent ; and he moreover loses thereby all his estate. And we likewise say that the partnership is dissolved, where one of the partners is so incumbered with debts, that he is obliged on that account, to abandon his effects to his creditors. We further say, that the partnership is dissolved by the death, or loss of the thing which was the object of the partnership : and so it would be, if the thing concern-

ing which the partnership was formed, should change its condition ; as if it were a thing of a nature to be converted to some use, and were afterwards made sacred ; or a dwelling house, afterwards converted into a church, or a piece of ground afterwards converted into a burying ground ; and so in other similar cases, (1)

LAW 11.

That a partner may quit the partnership, if he be not pleased with his partners.

Partnership has its effect, as long as the respective partners desire to continue in it. But when one of them, is no longer pleased with it, he may withdraw from it, if he choose, by saying to his partners ; “ until now, I was content to be in partnership with you, but henceforth, I desire no longer to be your partner : ” and the other partners cannot prevent him from withdrawing. But if such partner withdraw before the accomplishment of the object for which the partnership was formed, or before the expiration of the time for which it was to endure ; he will be bound to pay his co-partners for all the loss and damage they thereby sustain : unless they had agreed among themselves, at the time the partnership was contracted, that if either of them should not be pleased with it, he might withdraw from it, if he should think fit, either before or after the expiration of the above time. (2)

(1) C. art. 46, 51, 52 and 53, p. 398 and 400.

(2) C. art. 54, 55, 56, 57, p. 400.

LAW 12.

How the loss and profit ought to be divided between the partners, when one of them withdraws from the partnership for his own benefit, and to the detriment of the others.

Where the partnership is contracted under condition that all the gains acquired from the day it was contracted, should be in common among all the partners ; if afterwards, one of them, understanding that he was about to derive great gains from another source ; as if he knew that any one had instituted him heir, or that he intended to do so, or that he was about to derive great advantages from any other source, and should, on that account, fraudulently withdraw himself from his other partners, that he might enjoy the whole for himself, and deprive them of their share in the gains : if this fact can be proved, he will be bound to give their part of the gains to each of the other partners, notwithstanding he had already withdrawn from the partnership. We also say that, if from the day he withdraw from the partnership, he should lose or deteriorate any thing, the loss and damage will be exclusively his own, and will not affect the other partners ; and that which the other partners may acquire, after he had withdrawn from the partnership, will be entirely their own, and no part of it, will belong to him, on account of the fraud he had committed : for it is but just, that since he intended to cause his partners to lose, the whole of the loss should be on his account. (1)

(1) C. art. 55, p. 400.

LAW 13.

How the profits and losses are to be divided among the partners, when the partnership is dissolved for any lawful cause.

When the partnership is dissolved for any of the causes mentioned in the preceding laws, the partners ought immediately to divide among themselves, all the profits and losses, in the manner agreed upon, at the time the partnership was contracted. And if any loss had been sustained, through the fraud of one of the partners, he alone must support such loss; and he cannot excuse himself from it, by saying that he had, on the other side, made such great gains as to overbalance the loss; unless however one, or more of the other partners had committed some other equivalent fraud; for then, we say that the loss ought to be divided among those who had committed the fraud, so as not to affect the others. (1)

LAW 14.

For what causes one partner may separate himself from the others, before the expiration of the time.

A partnership may be dissolved before the expiration of the time for which it was contracted, for four causes. The first is, where one of the partners is so untractable and ill disposed, or otherwise of such bad temper, as to be insupportable to the other partners who cannot live in harmony with him. The second is, where one of the partners is sent on a mission by the

(1) *R. l. 2, tit. 16, b. 5—C. art. 28, p. 394.*

king, or by the corporation of any city or town : or where he is charged with an office, or to do any service for the benefit of the king, or the corporation of the place. The third is, where one of the partners does not comply with the conditions upon which the partnership had been expressly contracted. The fourth is, where the thing which was the object of the partnership, is in such a bad condition as not to be used ; as if it be a ship which was to go to sea, but which is so decayed, or deteriorated, as that it cannot be made use of : or where one of the partners had designated a country, or town, or house where they were to carry on commerce, or where the thing is which was the object of it ; and afterwards they should wish to transfer it to another place, or change the object of the partnership for another, different from what was agreed upon, or should make any other similar change. (1)

LAW 15.

Where the partner who holds the partnership effects, falls into a state of poverty ; what may, in that case, be required of him by his other partners.

Where there are several partners, as three or more, and one of them who has the partnership effects under his care, gives to one or two of them, their shares, without the knowledge or command of the other, or others ; and he afterwards fall into a state of poverty, so as not to have enough left to give their shares to the other or others, without whose knowledge he had

(1) C. art. 58, p. 400.

given the shares as above said, then we say, that what had been thus received, shall be returned back to the partnership, and divided again among all the partners. But if the partners who had not received their shares of the effects, knew that he who had them under his care and power, had given the others their shares, and they neglect for too long a time to demand theirs ; if then the partner who so had the care of the effects, should become poor, they cannot afterwards require the others to bring back what they had received, as they were in fault for not having demanded their shares, when they could have recovered them. We moreover say, that if one partner acknowledge to another, that he owes him a debt, on account of the partnership ; or if he be condemned therefor by a judgement of court, the partnership enjoys such privileges and immunities, that if, by paying the debt, the indebted partner would become so poor, that he would not have wherewith to live, then judgment ought not to be rendered against him for the payment of the whole debt : but on the contrary, the judge of the place, ought to order him to pay such a part of it, as may, in his discretion, leave him wherewith to live ; and the partner to whom the debt was due, cannot compel him to pay more. Yet the judge ought to take security of him, that if he should thereafter acquire the means to pay the balance that is due, he would accordingly pay it. This is understood, when the debtor has no trade whereby he can make a living ; for if he have one, he ought to pay the whole of the debt, if he have the means, and to work at his trade for a livelihood.

LAW 16.

That the debts and expenses incurred by one of the partners, for the benefit of the partnership, ought to be repaid to him.

If one of the partners incur any expenses for the benefit, or advancement of the partnership : or if he go on the business of the partnership and fall sick and incur expenses for his cure ; as in paying the physician's bill, or by buying medicine ; such and other like expenses, he may take out of the partnership funds. We likewise say that if one of the partners become subject to pay any imposts or duty, (*manliua*) for the benefit of the partnership, and had promised to pay them immediately ; he may take from the partnership funds, enough to pay the same, before such funds are divided. But if he had agreed to pay the imposts or duties conditionally, or after a term of time, then we say, that the partner who contracted the debt, ought to bring forward the things belonging to the partnership, and divide them with his partners. But he may require security of each of them, that he will pay his part of the debt, at the time agreed upon for the payments of it. (1)

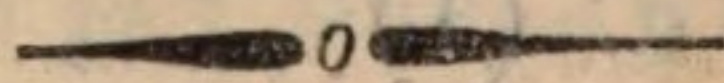
LAW 17.

That the things which men take out of the partnership effects, must be returned to the heirs of their co-partners.

One partner sometimes takes something out of the effects belonging to the partnership, without the

(1) C. art. 30, p. 394.

knowledge of the others : yet these others ought not, on that account, to suppose that he is guilty of theft : for one ought not to presume that a man would steal a thing of which he was part-owner. Wherefore we say that no action of theft, can be brought for what one of the partners had taken in this way : unless there exist such strong proofs against him, as to induce the belief that he took it, with the intention of stealing it. We also say, that if one partner be bound to give, or return a debt, or other thing to another, and he die before he does it ; his heir will be bound to give or return what was due. And so, where he who was to receive the thing, should die ; his partner will be bound to give it to the heir of the deceased. For although the heir cannot enter into the place of the deceased partner : nevertheless in these things : or where one of the partners brings a suit against the other, on account of the partnership, the heir is bound towards the other partners and their heirs to answer thereto, and to pay, or to receive in the place of him whose goods he inherits.



TITLES,

Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of LAS SIETE PARTIDAS, on promises and obligations.

Digest lib. 44, tit. 7, - - *De obligationibus et actionibus.*

Digest lib. 45, tit. 1, - - *De verborum obligationibus.*

Digest lib. 45, tit. 3, - - *De stipulatione servorum.*

- Digest lib. 46, tit. 5, - - *De stipulationibus prætoriiis.*
 Institutes lib. 3, tit. 14, - *De obligationibus.*
 Institutes lib. 3, tit. 15, - *Cuibus modis re contrahitur obliga-*
tio.
 Institutes lib. 3, tit. 16, - *De verborum obligationibus.*
 Institutes lib. 3, tit. 18, - *De obligatione servorum.*
 Institutes lib. 3, tit. 19, - *De divisione stipulationum*
 Institutes lib. 3, tit. 20, - *De inutilibus stipulationibus.*
 Code lib. 4, tit. 20, - - *De obligationibus et actionibus.*
 Code lib. 8, tit. 38, - - *De contrahenda et committenda*
stipulatione.
 Code lib. 8, tit. 39, - - *De inutilibus stipulationibus.*
 Code lib. 8, tit. 40, - - *De duobus reis stipulandi et pro-*
mittendi.
 Recopilacion de Castilla, book 5, tit. 16.
 Civil Code, book 3, tit. 3.

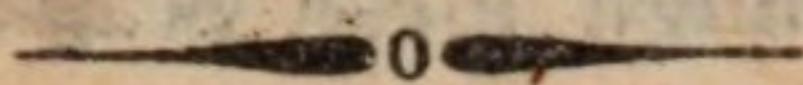
PROMISES AND OBLIGATIONS.

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TITLE XI.

Of the promises and obligations which men contract with one another, to do, observe, or perform certain things.

LAW 1.

What a promise is, what good arises from it, and in what manner it is made.

A promise is a verbal agreement mutually entered into between men, with the intention to obligate themselves the one to the other, to give or to do a certain thing agreed upon. It is of great utility when lawfully made and for a good consideration, as the parties are then reciprocally bound for the performance of what they had promised. It is made in the following manner ; both the parties wishing to stipulate, being present and the one of them saying to the other, “ do you promise me to give, or to do such a thing,” expressly saying what thing, and the other answering “ he promises,” or that “ he obligates himself to do it.” By answering in these or similar words, he will be bound to do, or to give what he had promised. And notwithstanding the parties making such an agreement,

should not speak the same language, as if one spoke Latin and the other Arabic, yet the promise would be valid, if they understood one another upon the question and answer. And so we say it would be where they spoke different languages and did not understand one another, provided they were both present and signed the agreement, through an interpreter whom they had mutually chosen; the promise, would then be as valid as if the parties had understood one another. (1) (a)

LAW 2.

That a promise must be made in words and not by signs.

A promise by question and answer, must be made in words, with the intention to obligate one's self; and at the time it is made, other words must not intervene: but when one party ask the question, the other should answer whether he be willing or not. And if it be made by one of them, saying; "do you promise me to give, or to do such a thing," calling it by name, and the other answer "why not," he will be as effectually bound, as if he had promised it. But if he to whom, the question was put, answer, "very well," or "well, it shall be done," then we say he would not be bound by such words. So we say if when he were

(1) *R. l. 2 tit. 16, b. 5.—C. art. 1, p. 260.*

(a) This form of agreement or promise by question and answer, called *stipulatio* by the Romans, is rendered unnecessary by law 2, tit. 16, b. 5, of the *Recopilacion* of Castille which provides that every agreement shall be binding on the parties, whatever may be the manner in which it is contracted.

questioned, he had answered nothing, but had only moved his head, or made some other sign, not saying either yes or no, nor any other words, he would not be bound. (a) For such an obligation as this, being contracted by words only, cannot be by signs. And we therefore say that the deaf and dumb cannot obligate themselves nor enter into engagements made in this way, for the dumb cannot ask a question or give an answer, nor can the deaf hear when they are questioned ; although they may enter into other engagements that are contracted by simple consent. (1)

LAW 3.

Why a promise may be valid, although the parties were not present, when it was made.

If a man be willing to obligate himself to pay the debt of a third person, and send to the creditor, either a letter, or his messenger to promise, or tell him that he obligates himself to pay the debt of such a one, mentioning him by name : although such an obligation as this, would not be valid if contracted originally for his own debt, out of the presence of the parties, yet it would be for the debt of a third person, of whatever nature it might be. And so we say it would be, when a man owed a sum of money, to be paid on a certain day, and when the day arrived, he send to inform the creditor by letter, that he could not then pay

(a) See the note on the preceding law and the authorities there cited.

(1) *R. ll. 1 and 2, tit. 16, b. 5.*

him, but that he would do it at a certain place and on a certain day therein designated ; such an obligation would be valid, because it is founded upon an old debt. And whatever might have been the words he made use of in his letter, or through his messenger, if it could be infered from them, that he intended to obligate himself to pay an old debt, whether it were his own, or that of another person, he would be bound thereby. But, if from the words contained in his letter, or conveyed through his messenger, it could not be infered that he really intended to obligate himself to pay the debt, he would not be bound. Such would be the case where he should sent word that “the debt which such a one owes you, shall be fully paid, and you shall have security for it, or you shall soon have it ;” or should use other like ambiguous words, without saying he would pay the debt himself. And we also say that if any one engage to pay an old debt, in either of the ways above mentioned, by saying or promising, that he and another person, whom he mentions by name, will pay it at such a time, if the person thus named, give his consent to what was promised, both of them will be bound to pay equal portions of it. But if the other do not consent, saying he will pay nothing, the person making the promise, will remain bound to pay the half only. But if at the time he promised to pay, he had said that he, *or* the other person named by him, would pay the debt ; if then such other person should not consent to what was promised, he who made the promise, will be bound alone, for the whole of the debt. (1)

(1) *R. l. 2, tit. 16, b. 5.*

LAW 4.

Between what persons a promise may be made.

Every person may make a promise, who is not expressly prohibited from it. And that it may be known with certainty, who such prohibited persons are, we will here enumerate them. And we say they are the lunatic or madman, the minor under seven years of age, called in Latin *infans*, or the pupil under fourteen years, and above seven : for the latter cannot make a promise to his prejudice. But if he profit thereby, the promise will be valid so far as it is advantageous to him, and so far he will be bound by it and no further. And what we here say of the pupil, applies to the minor above fourteen years and under twenty-five, who has a guardian. For the promise which he makes, without the authorization of his guardian, is not valid, unless advantageous to him, as is above said of the pupil. (1)

LAW 5.

That prodigals and orphans under the guardianship of others, can make no promise to their prejudice.

We further say that if a minor over fourteen and under twenty-five years of age, who has no guardian, make a promise, obligating himself, in any manner whatever, it will be valid. But if he discover he were defrauded thereby, or had made it to his prejudice, he may petition the judge of the place for restitution, and to release him from his promise, and place him in his

(1) *R. l. 2, tit. 16, b. 5.—ibid l. 2, tit. 11, b. 5.—C. art. 23 & 24, R.*

former condition. And if the judge find that he was really a minor under twenty-five years, and that the promise he had made, was to his prejudice, he should rescind it and decree the obligation to be null. (1)

(No other part of this law in force.)

LAW 6.

That an obligatory promise can not be made between the father and son, and the master and slave.

The father can not make a promise to his son whom he has under his power, nor the son to the father, so as to obligate themselves to one another; unless concerning those acquisitions, called in Latin *peculium castrense, vel quasi castrense*, according to what we have said in the title which treats of the power that fathers have over their children. And we also say, that the master cannot contract a promise with his slave, nor the slave with his master, so as to compel a mutual performance of it. And if they should contract one, it would not be valid, unless the slave had promised a sum of money to his master, for his enfranchisement, and after he were enfranchised, should refuse to pay it: by such a promise he would be obligated and bound for its performance.

LAW 7.

That one man can not receive from another a promise in the name of a person under whose power he is not.

One man can not receive from another, a promise in

(1) C. art, 205, p. 302;

the name of a third person under whose power he is not. As if one should say to the other ; “ do you promise me that you will give to such a one, such a thing ?” And the other answer, “ I promise.” Such a promise would not be obligatory on him who made it ; and the third person in whose name it was made, neither can nor ought to compel him to its performance. But if the promisor had said, “ I promise to give you, or such a one, such a thing,” and of his own free will and without constraint, had consented to fulfil his promise, by delivering to such third person what he had promised to give him ; he could not afterwards reclaim it, nor would the other be obliged to return it. But he who received the promise, could compel such third person by a suit, to restore what he had received by his order. But he who is in the power of another, as the son in the name of the father, the slave in the name of his master, or a monk in the name of his superior, may receive promises from third persons : and the promises which they so receive, in the names of those under whose power they are, will be valid, and they in whose name, they were received, may require their performance in the same manner, as if they had been made to themselves. And we also say that the judges and notaries of the council, who write their acts, may receive promise in the name of another : as when they receive them in the name of orphans, from their guardians who promise to take care well and faithfully of their persons and estates : or when they receive them in court, from one of the parties, in the name of the other, upon any suit existing between them : or take a promise to keep the peace, or other

like agreement. For although neither of the persons in whose name the promise was stipulated be present at the time, yet it would be valid : and he in whose name it was received, may require its performance in the same manner as if it had been made personally to him. For they in whose names they were made, are considered as under the power and guardianship of these officers of the law ; who, as such are the public servants of the council of the place where they reside, for every thing, they have to do and which appertains to their offices. (1)

LAW 8.

Who may receive promises for another.

The attorney of the king, or of the corporation of any town, borough or other place, and also the guardian of a minor, of a madman or lunatic, may each of them, receive promises in the names of those for whom they are agents and guardians ; and such promises will be valid and may be enforced as well by those in whose names they were made, as by the agent or guardian who received them. But if the attorney in fact of any other persons than those above mentioned, receive a promise in the name of his constituent, though it would be valid, yet he in whose name it was received can not require that the thing promised should be done or given, until authorized to that effect by his attorney. (a) And if he will not authorize him, then

(1) *R. L. 2. tit. 16, b. 5.*

(a) This provision is no longer observed ; when the contract is in the name of the constituent, it is not now necessary for him to be authorized by his attorney in fact, to enable him to act against the obligor.

the judge of the place may put him into possession of as much of the goods and effects of his attorney, as shall equal the value of the object promised. But if he be so poor as to have no estate of which possession can be so given, then he in whose name the promise was made, may demand its performance, as though it had been made to him personally. (1)

LAW 9.

That the constituent may require the performance of what has been promised to his attorney in fact.

There are certain things in which the performance of promises received by attorneys in fact, may be required by those in whose names they were received, though not empowered to that effect by such attorney. As when he received the promise in presence of him in whose name it was made : or in his absence, when the promise was concerning a thing the property of the constituent ; as the letting out of his house, or estate, or any like thing, or where the promise was made in court to the attorney, touching any suit which he sustains for his constituent, either as plaintiff or defendant. (2)

LAW 10.

That the performance may be required of a promise made in the name of another, without any letter of attorney to that effect,

Where a man owes a sum of money, or any other

(1) *R. l. 2, tit. 16, b. 5.* (2) *R. l. 2, tit. 16, b. 5.*

thing, and a third person promise him in the name of his creditor, saying: "do you promise me to give to such a one, such a sum of money, or such a thing which I owe him?" If the other answer: "I promise;" he will be bound to perform his promise; and he to whom it was made, may compel him thereto, although he in whose name it was made, could not. (a) And the obligor will be bound not only to fulfill his agreement, but to pay all loss and damages occasioned by his refusal. (1)

LAW 11.

That no one can promise for the act of another.

No man can promise for the act of another: as if one should say: "I promise that such a one shall give you such a sum of money, or shall do such work for you;" or other like thing: such a promise made out of a court of justice, would not be valid. It would be otherwise, if he had promised that his heirs should give or do any thing; for then the promise would be valid. Yet if at the time he made it, he had said; "I promise you that I will procure, or cause such a one to give, or to do such a thing for you;" we say this promise will be valid; because he stipulated not only for the act of another, but for his own. And if this other did not fulfill the engagement, then he would be bound to do it himself, or pay all the losses and damages consequent thereupon. But when a promise is made in a

(a) Third persons have now an action direct against the obligor according to law 3, tit. 8. book 3 of the *Ordenamiento Real*.

(1) *R. l.* 2, *tit.* 16, *l.* 5.

court of justice, concerning the act of another, as if one should say : “ I promise you that such a one shall appear in court, or that he shall comply with what is decreed in such a suit ; or that he shall well and faithfully administer the estate of such a minor ;” a promise so made for any of these or like causes, will be valid against him who made it, although he stipulated for the act of another. (1)

LAW 12.

How many sorts of promises there are.

Promises may be validly made in three ways. The first, is where a man promises another to give or to do a certain thing, without annexing any condition, or fixing a time for its performance ; this promise is called in Latin *pura*. The second, is where the promise is made to be performed on a day fixed, which is called in Latin *promissio in diem* : and it may be also made for a day which cannot be fixed with certainty, but which will not fail to arrive ; as if the obligor should say : “ I promise you that my heirs shall give or do for you, such a thing on the day of my death ;” and although the day cannot be indicated with certainty at the time the promise is made, yet the day of his death is fixed upon, and his heirs will be bound for the performance of the promise. And we likewise say that a man may promise to give or to do a thing, a certain number of days before or after his death : as if he should say : “ I promise to give or to do such a thing, ten days before or after my death ;” his heirs

(1) C. art. 19, p. 262.

would be bound to perform such a promise, unless he had promised to perform it personally and not through another ; for then, the promise would not be valid, if he died before he had performed it. The third way of making a valid promise, is where one promises to give, or to do a thing under some condition, which in latin is called a conditional promise, and is made by saying thus: “ I promise such a one, to give or to do such a thing, if such a vessel arrive at Seville from Morocco ;” or under any like condition, when it is not certain whether it will happen or not. And we say this conditional promise may be made in another manner, as if the obligor had said: “ I promise to give or to do such a thing if they have made such a one pope,” or under any like condition relating to time past. And this condition is not of the same nature as the first which relates to time to come ; for where it relates to time past, although the obligor should not know whether the condition had happened or not, yet from the moment of the promise he is bound, if it had happened : or discharged, if it had not. But it is not so where the condition relates to time to come, for then the obligor cannot be bound or discharged until the happening of the condition ; which, if it happen, he will be bound, otherwise the promise will not be valid. (1).

(1) *R. l. 2, tit. 16, b. 5—C. art. 68, p. 272.*

LAW 13.

Within what time a promise ought to be performed.

Where a man obligates himself to give or to do a thing, in the first of the three ways mentioned in the preceding law, by the promise called *pura*, it will be valid although no time or place be fixed for its performance. And the judge of the place, in his discretion, ought to assign to the obligor, a proper time for the execution of his agreement. And if he conceive that a sufficient time has already elapsed for the obligor, had he been willing to have fulfilled his promise, he ought to compel him to its performance immediately after a certain time which, in his discretion, he will fix, according to the circumstances of the case. And if a man promise to give, or to do a thing in a certain place, without mentioning any time and afterwards absconds, with the intent to avoid maliciously the performance of his agreement; we say that if sufficient time had already elapsed for him to have gone to the place, had he been so disposed, the judge of the place ought to compel him to perform his promise, wherever he may be found, although it should not be in the place agreed upon. And not only will he be obliged to perform what he had promised to give or to do, but moreover to pay to the obligee, all the loss and damage he had sustained for not executing it, in the place agreed upon. But if the obligee voluntarily receive from the other, the thing he had promised to give or to do, without then demanding the loss or damages, or the penalty stipulated, or mentioning any of these

things, he cannot afterwards require them, notwithstanding payment was not made in the place it had been promised. (1)

LAW 14.

That the thing promised cannot be demanded until the time fixed arrives, or until the happening of the condition of the promise.

When a man promises to give or to do a thing on a day certain, or under condition, he is not bound to perform his promise before the day arrives, or the condition happens. And if one of the contracting parties die before the condition happen, or the day arrive for the performance of the promise, his heirs will be bound therefor, in the same manner he was himself, although the condition should happen, or the day arrive after his death. (2)

LAW 15.

How a promise to give or to pay a thing certain on the calends of each year, is to be performed.

The first day of every month is called *calends*. And if a man promise to give or to do a thing on the *calends*, without designating which, we say the promise ought to be performed on the first *calends* that arrive thereafter. We also say that if a man promise to give another, every year, so many maravedis, or to

(1) R. l. 2, tit. 16, b. 5.

(2) R. l. 2, tit. 16, b. 5.—C. art. 86, ff. 276.

do such a thing, without saying at what period of the year, it is understood the promise is to be performed at the end of every year. But if he had made the promise by saying: "he would give or do what he promised all the years of his life;" then it is understood the promise is to be performed at the commencement of every year. And we likewise say that when a man promises to give or to do such a thing, without specifying any time or day; obligating himself, in case he did not give or do it, to pay, as a penalty, so many *mavedis* or such a thing, it is then understood that the penalty may be demanded of the obligor, in case he were able to give or to do what he had promised, and had refused to do it, when sued therefor in a court of justice. But if the condition be placed before the promise, as by saying: "if I do not give you, or do such a thing, I promise to give to you or pay, so many *mavedis*;" such a condition is understood to defer the execution of the promise until the death of the obligor; or until the thing promised disappear, whether it die, be destroyed, or lost; and from that day the penalty may be demanded. (1)

LAW 16.

At what time a promise made under condition, ought to be performed.

We said in the preceding law, that when the condition of a promise is placed before the penalty, it might defer its performance during the life of the obligor; but there are cases where it is not so. The

(1) *R. l. 2, tit. 16, b. 5.*

First, is where a promise of the same thing, is made to two persons separately in the same manner : as if a man should say : “ If I do not give such a person, such vineyard belonging to me, I will give it to you ;” and afterwards he say the same thing to another : “ If I do not give such a person, a vineyard belonging to me, I will give it to you ;” for if one of them, sue him for the thing he had promised, he will be obliged to give it to him. And if the other should afterwards sue for it, the obligor will not be obliged to answer : but he will, at any rate, be obliged to give it to him who shall first join issue therefor. The second case, is where one man becomes security for another, saying : “ If such a one does not give you so many maravedis, I promise you that I will :” if the obligee sue the debtor for the payment of the money and he refuse ; from that moment, the security is bound by his promise and he will be obliged to pay immediately. The third case, is where a man expresses himself in his last will, in the following manner : “ If my heir should not give such a one, such an estate belonging to me, or such a thing, I order that he pay him so many maravedis or give him such a thing.” For if the heir, after the death of the testator, is able, and will not give the thing, the other may, from that moment, either sue him for it, or for the penalty imposed upon him. The fourth case, is where a man declares in his will : “ If such a one my slave should not go to such a place, or should not do such a thing, I order that he be free” : for from the moment the slave had it in his

power to do the thing prohibited and did not choose to do it, he became free. (1)

LAW 17.

Of a promise made under condition to be performed, on a day fixed.

Where a man promises to give or to do a thing under condition, on a day certain, although the condition should happen, he will not be obliged to execute his promise, unless he choose, before the arrival of the day fixed for its performance. We also say that if a man promise to give or to do a thing and annex thereto a condition which, according to the course of nature, can not, in any way, happen, he will nevertheless be bound for its performance, from the moment it was made ; as for example, if he should say : “ If you do not touch the heavens with your finger, I promise you to give or do such a thing.” For as it is certain that, in the course of nature, no one can do such a thing, the obligor will, from that moment, be obliged to perform his promise. And so we say it would be of any other promise made under any similar condition whatever. (2)

LAW 18.

That a man is not bound to deliver the thing he has promised, if it die or be deteriorated.

Where a man promises to give or to do a specific

(1) *R. l. 2, tit. 16, b. 5.*

(2) *R. l. 2, tit. 16, b. 5,—C. art. 72 & 73, p. 272.*

thing, on a day certain and before that day arrive the thing die a natural death, without the fault of the obligor, he is not bound to deliver it, or any thing else in its stead ; but if it die after the day on which it was to have been delivered, he will then be bound to pay its estimated value. And where a man promises to give a thing, without fixing a day certain for its delivery, if the obligee demand it, and the other refuse to deliver it, when he had it in his power, we say that if it afterwards die a natural death, the obligor will be bound to pay its value. But if it die before the obligee demanded it, then the obligor will not be obliged to pay any thing therefor. (1)

LAW 19.

If a man kill the thing he had promised, he will be bound to pay its value.

If a man promise to give a specific thing and then kill it, he will be bound to pay its value, unless he had just cause for so doing ; as for example where the particular thing promised was a slave, and the obligor afterwards found him with his wife or daughter ; or when he had committed any similar offence for which the master had a legal right to kill him, then he would have nothing to pay for the slave.

LAW 20.

What things may be the subject of a promise.

Every thing which men have in their power, and

(2) *R. l. 2, tit. 16, b. 5, — C. art. 202, p. 300,*

which they are in the habit of transferring to one another, may be the subject of a promise. It is the same with the things not yet in being ; as the fruits of a vineyard, an orchard, a field, or the child of a slave, the young of cattle, or other like thing. Although they should not be in existence at the time of the promise, yet as they may afterwards be, the promise is valid, and the obligor is bound to perform it, as soon as the fruit or child are in a condition to be delivered. But if the objects of the promise, produce neither increase, nor fruits, then he will not be bound to perform it, unless he had maliciously practised means to prevent them from producing any ; for then he will be obliged to pay their value for the fraud he had committed. (1)

LAW 21.

What things cannot be the subject of a promise.

Men sometimes make promises which are not valid : as when one promises to give or to do a thing which never was, nor can be in existence. And so where a man promised to give or to do a thing physically or morally impossible, as if he should say : “ I will give you the sun or moon, or make for you, a mountain of gold ;” such like promises would not be valid. And so we say it would be where a man promised another, to give him a certain thing, as a horse, or other like object already dead, at the time of the promise ; such promise would not be valid, nor would he be bound to give the thing, or any other in its stead.

(1) *R. l. 2, tit. 16, b. 5.—C. art. 28 & 30, p. 264.*

LAW 22.

That things sacred or holy cannot be the subject of a promise ; nor can a christian be promised to a person of another religion.

A man cannot promise to give a thing sacred, holy or religious, nor a freeman as a slave. A promise of such like things, would not be valid. And although any of them, should so change their condition, after the promise was made, that they might become the subject of a promise at another time : as if the thing become secular by falling into the hands of the laity ; or the freeman become, on any account, a slave ; the promise would not, for that reason, be valid ; for at the time it was made, the things were of such a nature, as not to be the subject of a promise. (1)

(No other part of this law in force.)

LAW 23.

That when a man has two slaves of the same name, and promises to give one of them ; it will be at his option, to give which he pleases.

Two or more slaves belonging to the same master, have sometimes the same name and the owner may happen to promise to give one of them, calling him by name, without describing his person or mentioning his trade, if any he has. In this case, we say it would be at the option of the obligor to give either of the slaves bearing the same name. And so it would be

(1) C. art. 28, p. 264.

if one man should say to another : “ I promise to give you such *or* such a thing ;” for it will be at his option, to give which of them he thought proper, while they were in being. But if one of them, should die, he will then be obliged to give that which survives. (1)

LAW 24.

Of promises made of several things jointly or separately.

Or and *and* are two words which make great difference in promises containing them. For *or* separates and disunites the things promised ; as for example if the obligor should say : “ I promise to give you a horse *or* a mule ;” he will be bound to give only one of them, which he pleased, and no more. And such would be the case with every other promise for any thing whatever, made in like manner. The word *and*, on the contrary, joins together the things mentioned in the promise : as for example if one man should say to another : “ do you promise to give me a horse *and* a mule ?” If he answer simply ; “ I promise ;” the promise will be binding for both. But if he had answered, that he would give one of them only, the promise would be valid for that much and for no more. (2)

(1) *C. art. 89, 90, 91 & 93, p. 276.*

(2) *C. art. 89, 90, 91 & 93, p. 276.*

LAW 25.

Of things promised to be given or done in one of two towns bearing the same name.

There are different towns, both of which have the same name. Wherefore we say that if a man promise to give any thing to another, on a certain day, in a place which he mentions, and there be another town or place of the same name ; as *Cartagena* in Spain, and *Cartagena* in Africa ; or *Cremona* in Spain and *Cremona* in Lombardy : and the parties happen to disagree among themselves ; the one saying the promise was to be performed in one place, and the other in another ; in that case, if the most distant town of the two, be so far from the place where the promise was made, that the obligor cannot reach it by the day fixed for the performance, it is then understood he should perform it in the nearest. And if no day be fixed for its performance, it is then understood that he should perform it, in the town which is in the kingdom where the promise is made.

LAW 26.

That the question and answer of a promise, should turn upon the thing embraced by the promise.

The answer must agree with the question, at the time it is put, so that the obligor shall answer in the same manner he is questioned : otherwise the promise will not be valid. As for example ; if one should say : “ do you promise me to give or do such a thing ; ” and the other answer conditionally : “ I promise to do it, if

such a thing happen :” such a promise would not be valid, unless he who put the question immediately assents to what was answered. And the reason that such a promise is not valid, is that the obligor ought to have answered in the same manner, and upon the same thing he was questioned, and not in a different manner and upon a different thing. But if the obligee questioned the other about a certain sum of money ; as if he had said : “do you promise to give me a hundred maravedis ;” and the other had answered : “ I promise to give you fifty ;” and the obligee remain silent, making no reply to the answer, the promise will be valid for the fifty maravedis which were promised. And so it would be, if he had put the question thus : “do you promise to give me a hundred maravedis, and the other had answered ; “ I promise to give you a hundred and fifty ;” the promise would be valid, as to the hundred maravedis embraced in the question, and no more, if the obligee remained silent when the answer was given ; but if he replied that he accepted the promise, it would then be valid for the whole sum. (1)

LAW 27.

Whether or not a promise is valid which is made concerning a thing not asked of the obligor.

There are animals, slaves, birds and other like things which have specific names. Wherefore we say that if a man desiring to obtain a promise of another, should say : “do you promise to give me such a slave named

(1) R. l. 2, tit. 16, b. 5.

Abdala ;” and the other answered : “ I promise to give Abraham ;” the promise would not be valid. But it would be otherwise, if he who put the question immediately assented to what the other had answered ; for then the promise would be valid, as to the slave mentioned by the obligor. So we say the same thing must be observed in all promises made in a similar manner, where the answer did not agree with the question. (1)

LAW 28.

A promise made through force, is not valid.

If a man be compelled by force, fear or fraud to promise to give or to do any thing ; although he should obligate himself under a penalty, and by an oath, to do what he promised, yet we say he would not be bound to perform it, nor to pay the penalty. But if after he made the promise, he pay or perform, without compulsion, what he had promised, he could not afterwards reclaim what he had given or done. And the reason is that by doing of his own accord and without constraint, what he had promised, he thereby lost the right he had of refusing to do or to pay what he had promised, through fear, force or fraud. We also say that every contract made contrary to law or to good morals, though under a penalty or an oath, ought not to be observed. (2)

(1) *R. l. 2, tit. 16, b. 5.*

(2) *C. art. 9, 31 & 33 n. 262 & 264.*

LAW 29.

That the promise is not valid which a man makes to his steward or manager, not to prosecute him, for the robberies or fraud he may commit upon him.

If a man agree with his steward or manager, not to prosecute him, for the fraud or thefts, he may commit upon him in future, such agreement or promise would not be valid : and the reason is that such contracts may excite men to do evil, and ought not therefore to be observed. Yet this is to be so understood, that the agreement or promise is invalid, only as to the frauds or thefts which may be committed, after the day of the promise. But as to those committed before, he may well release him who committed them, and for ever renounce his right of action against him. And what is said in this law of stewards and managers, applies equally to all other persons who make contracts or promises, concerning things of a like nature.

LAW 30.

That a promise not to sue, after an account rendered, is not valid, if there had been any fraud committed in the account.

Where a man holds an office, under a lord, a council, or other person, and at the time he tenders his account, fraudulently conceals any thing ; although the lord had approved the account, given him an acquittance in writing, and promised never in future, to sue him therefor, such agreement or promise would not be valid, as to what had been concealed, but would be valid, as to every thing else of which he had ren-

dered a true account. And we say that the same rule applies to all accounts which men render among themselves, concerning things which they hold in common. For although they should acknowledge payment of their respective accounts, and promise never to sue therefor, if it should afterwards clearly appear, that he who rendered the account, or had been charged with the keeping of the things, had fraudulently concealed a part or had practised any other fraud upon those interested, such agreement or promise would not be valid. We say on the contrary, that they who suffered by the fraud, may sue for what had been concealed, as well as for all the loss and damages they had thereby sustained, unless they had expressly acquitted him of the fraud he had committed.

LAW 31.

That a promise founded on usury, is not valid.

If a man give twenty maravedis, or any other sum of money to another, and receive from him, a promise to return thirty or forty, such promise would not be valid, nor would the obligor be bound to perform it, unless for the twenty maravedis he had received, because it would be a sort of usury. But if a man give another twenty maravedis, and take a promise to return eighteen or any other less sum than he had received, such a promise would be valid, because not vitiated by usury, as he received less than he gave. (1).

(1) *R. l. 4, tit. 6, b. 8.*

LAW 32.

How a promise ought to be annulled, when one of the contracting parties declares he was not present at the time it was made.

Men may maliciously attempt to annul the promises they have made, alleging they were not present, nor in the place where they are said to have been contracted. Wherefore we say that if it appear that there was an act made by the hand of a notary public, signed by witnesses ; or any other writing sealed with an authentic seal, in which it is said the parties were present, promising one another, to give or to do any thing ; faith shall be given to the act, though the other deny he were present, or had made the promise. But if he can prove by three or four good, lawful and credible witnesses, that on the day on which the act declares he made the promise, he were so far from the place where the act is said to have been passed, that he could not, in any way, have been there, the testimony ought to be admitted. And if he cannot prove it by witnesses, it will be sufficient if he prove it by another act passed by the hand of a notary public, of such a nature, that it is certain he could not have been present, nor in the place where the promise was made. For if he prove either of these things, faith should not be given to the act produced against him.

LAW 33.

That the promise or contract which the parties enter into, to inherit from one another, is not valid, except in certain cases.

Where two men agree among themselves, that if one of them die first, the survivor shall inherit his estate ; such an agreement would not be valid, lest one of them, be induced to attempt the life of the other, to inherit his estate. But if such agreement were made by two military men, during a battle, or at the time they were about to engage in it, and one of them die on the spot, the survivor will inherit his estate, unless the deceased had left legitimate children. But if neither of them lose his life, and after the battle, one of them change his mind and desire to revoke the agreement or promise, he may do it. But if he does not revoke it, and persists in it, until the death of one of them, the survivor will inherit the estate of the deceased, as is above said. (1)

LAW 34.

What penalty they merit who do not observe the promise they make.

Men sometimes annex penalties to their promises, that they may be firmer and better observed, and this penalty is what is called in Latin *conventionalis* ; that is to say, a penalty stipulated at the will of both par-

(1) *R. l. 8, tit. 10, b. 5.*

ties. Wherefore we say that notwithstanding the penalty, the obligor is not bound both to pay it, and to do what he had promised, but only one of them. It would be otherwise, if at the time he made the promise, he had obligated himself to do both ; to pay the penalty and to perform the promise in every respect, in case he did not conform to his agreement : for then, both the penalty and the thing promised, may be required of him. (1)

LAW 35.

What penalty he deserves who promises to give, or to do any thing, on a day certain, and does neither.

Where a man promises to give or to do any thing, under a certain penalty and on a day fixed ; if on that day, he neither gives, or does what he has promised, he will be bound to pay the penalty, or to perform his promise, according as the obligee shall choose ; and he cannot excuse himself for not doing what he had promised, under pretence that the other had never demanded it of him. And we also say, that if the obligor had not fixed a day certain for the performance of his promise, and the other afterwards, require him to perform it, at a proper time and place, and he refuse when it was in his power to have done it ; or if sufficient time had already elapsed for him to have performed it, had he so intended ; from that time, he will be bound to pay the penalty. We also say that if a man promise to give or to do any thing, without fixing a

(1) *R. l. 2, tit. 16, b. 5.—ibid l. 3, tit, 26, b. 8.—C. art. 126 & 129 & .284.*

day certain therefor, or obligating himself under any penalty, and through neglect, he suffer sufficient time to elapse, in which he could have performed his promise, had he wished it, and did not ; from that time, the obligee may sue for what was promised him, with all loss and damage he had sustained on that account. But if the obligor choose rather to enter immediately upon the performance of his promise, than to answer to the suit brought by the other against him, he ought to be permitted to do so : and if he perform it, he will not be bound to pay the loss and damage above mentioned. (1)

LAW 36.

Of the penalty under which one man obligates himself for the appearance of another, in a court of justice.

In Latin *pena judicialis* means that penalty which is stipulated upon a promise made in court. As where a man became security in court before the judge, under a penalty, that the defendant shall appear there, at the time fixed and perform and abide the judgment of the court. And although the security should not produce him at the time fixed, and not until two or three or five or even more days afterwards, as the judge shall think fit, he will not on that account, incur the penalty. But we ordain that the prolongation of delay here extended to the security beyond the time fixed, shall, in no wise, prejudice or impair the right of the other, in his principal suit ; but on the

(1) *R.l.* 3. *tit.* 26, *b.* 8—*ibid* *l.* 2, *tit.* 16, *b.* 2.—*C.* *art.* 30, *p.* 284

contrary that it shall remain entire, and that he may pursue it, as he could have done at the term first agreed upon. And so we say it would be of all like penalties under which promises are judicially contracted, (1).

LAW 37.

What will excuse a man from the penalty under which he had obligated himself to produce another in court, when he does not produce him according to promise.

Where a man becomes security in court for another, promising and obligating himself, under a certain penalty to bring him there, on a day fixed, we say that if he be prevented from so doing, by any lawful cause, as by sickness, or the inundation of a river, or other like obstacle, he will not, in that cause, be bound to pay the penalty ; but he ought to produce him in court, as soon as such obstacle is removed. And so we say it would be if any of the *judges arbitrators*, should order either of the parties, to do a thing, on a day fixed, under a certain penalty. For if he were prevented by any lawful cause, from doing what had been commanded him, he would not incur the penalty, had he desired to perform it, as promptly as he was able. And what we say in this and the preceeding laws, applies to penalties stipulated in court ; but as to those stipulated between the parties, out of court, if they do not perform what they had promised, by the day fixed upon for its performance, they will be bound to pay the penalty and cannot excuse themselves

(1) *ll. 2 & 10, tit. 16, b. 5.*

therefrom, under pretence of any hindrance whatever ; unless the penalty had been stipulated, concerning a specific thing which the party had promised to give, and which was lost or had perished, without his fault before the day on which it was to have been given or produced.

LAW 38.

That the penalty under which a man promises to kill another, or commit any other crime, cannot be recovered.

Where a penalty is stipulated between the parties for the performance of a promise not valid ; yet the penalty will be valid, and the obligor bound to pay it ; unless the promise were made for something contrary to law and good morals, as where a man had promised, under a certain penalty, to kill another, to commit adultery, or any similar crime : for then, he would not be bound to pay the penalty, although he should not perform his promise. And so we say where a man promises to give another, a specific thing, to kill any person, or to commit a crime, he will not be bound to give the thing he had promised, notwithstanding the other should commit the crime. But he who made the promise, as well as he who committed the crime, will be both obliged to suffer such punishment, or make such reparation therefor, as is ordained by the laws of this our book. (1)

(1) *R. l. 2, tit. 1, b. 2—C. art. 127, p. 284.*

LAW 39.

That the penalty stipulated on account of a marriage, cannot be demanded.

In order to ensure the marriages they wish to be contracted, men sometimes obligate themselves, under certain penalties to one another, for their accomplishment. And this they do because those who they promise shall intermarry, are not present, or not of age, or for some similar reason, Wherefore we say that if either of the parties should not be willing to contract the marriage, then he who made the promise for him, will not be bound to pay the penalty. And the reason is that marriage ought not to be contracted, through fear of any penalty, but through love and with the consent of both parties, as we have said in the fourth part of this book, which speaks of marriages.

LAW 40.

That a penalty stipulated on account of usury, cannot be demanded.

Men sometimes agree and promise one another, to give or to do a thing, and for the performance thereof, obligate themselves under a certain penalty which they are induced to annex to their promises, for two reasons, the first that they who promise, may be induced to perform what they had promised, through fear of the penalty. The second that they may thereby have occasion to exact fraudulently something by way of usury. Wherefore we say that if the penalty be stipu-

lated on account of a thing which a man promises to do, he will be bound to pay the penalty, if he does not perform his promise, as we have said in the preceding laws. But if it be stipulated, on account of a certain sum of money which he promises to give; and the obligee be a man in the habit of taking usury, then he will not be bound to pay the penalty, although he should not perform his promise, at the appointed time. But if the obligee were a man that had never taken usury, the obligor would be then obliged to pay the penalty, if he did not give the thing he had promised. We also say that every usurious contract or agreement, whether made before witnesses, or in writing, ought not to be observed. As where a man had really lent another a sum of money, and took therefor an estate in pledge, and pretending that he who pledged it, had sold it to him, should cause an act of sale to be made, in order that he might thereby enjoy the fruits, without danger of their being reclaimed on account of usury. Wherefore we say that such fraud ought not to prevail, if it be proved that the contract was really a loan and that the act of sale was simulated.

TITLES.

Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of **LAS SIETE PARTIDAS**, on Suretyships, Mandate and the *quasi contract negotiorum gestorum*.

Digest lib. 46, tit. 1, - - *De fidejussoribus et mandatoribus*.

Institutes lib. 3, tit. 21 - *De fidejussoribus*.

Institutes lib. 3, tit. 27, - *De mandato*,

Institutes lib. 3, tit. 28, - *De obligationibus quæ quasi ex contractu nascantur*.

Code lib. 4, tit. 35, - - - *Mandati vel contra*.

Novels Col. 1. tit. 4. - - *De dejussoribus et mandatoribus*.

Domat's Civil Law, part 1 b. 1. tit. 15—b. 2. tit. 4. & b. 3. tit. 4.

Fuero Real—book 3. tit. 18.

Partida 3. tit. 5.

Leyes del Estilo—ll. 23. 65. 116. 117. 154. 229.

Ordenamiento real—book 5. tit. 11.

Recopilacion de Castilla, book 5, tit. 11 l. 22.

Autos Accordados—book 2. tit. 14. autos 3. & 4.

Civil Code, book 3, tit. 4. 13 & 14.

OF SURETYSHIP.

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TITLE XII.

Of the suretyship which men stipulate with one another, in order that the promises, obligations and contracts which they enter into, may be the better observed. (a)

(a) Besides the contract of suretyship, this title treats also of the contract of mandate and of the *quasi-contract* of *negotiorum gestorum*.

LAW 1.

What is meant by suretyship; in what respect it is advantageous, and who can, or can not be security.

By security (*fiador*) is meant he who pledges his faith, at the command or request of him who gives him as security, to give to, or to perform something for another person. And it is very advantageous to him who receives the security; for he thereby becomes more certain of the performance of the obligation, as both the security and principal debtor are bound therefor. And we say that every man may become security who can make a promise obligatory on himself: likewise all those may receive securities, who can receive promises, as is said in the preceding title which treats of promises. (1)

LAW 2.

Who can not be security.

We likewise say, that a woman can not become security for another person: for it is not becoming that women should be engaged in litigation about the suretyships they had contracted, or go into public assemblies of men, where things take place, repugnant to the chastity and good morals which women ought to observe. (2)

(No other part of this law in force.)

(1) *R. ll. of the title 16. b. 5—C. art. 1. p. 428.*

(2) *R. l. 7. tit. 3. B. 5—Ibid. ll. 2. & 4. tit. 10. & l. 27. tit. 11. b. 9.—C. art. 17. p. 40. & art. 23. 24. p. 264.*

LAW 3.

In what cases women may become security.

Though we said in the preceding law, that a woman could not become security for any other person, yet there are cases in which she may. The first is, where she becomes the security of any one, on account of his liberty: as where a man wishes to enfranchise his slave for money, and she becomes security for the price of the enfranchisement. The second is, where she becomes security, in favour of a man for the dowry he is to receive from the woman he may marry. The third is, where well knowing that she can not, and ought not to become security, she does nevertheless become so, renouncing, of her own free will, all the rights which the law extends to women in that respect. The fourth is, where she becomes security for any one, and remains so during two years, and then gives a pledge to the person towards whom she was security, and executes another writing by which she renews the suretyship: for then it ought to be presumed that the principal debt for which she was security, appertained rather to herself, than to the person for whom she was security. The fifth is, where she receives a price for becoming security. The sixth is, where she fraudulently clothes herself in the apparel of a man; or practices some other fraud by means of which she is taken as security by one who believes her to be a man. For the rights which women enjoy with respect to suretyship, are not granted to enable them to practise fraud, but on account of their natural inexperience (*simplicidad*) and feebleness. The seventh is, where she becomes security in

relation to her own affairs (*por su fecho mismo*); as where she becomes security for a person who had been security for her; or in any other manner, for her own benefit or in relation to her own affairs. The eighth is, where she becomes security for any one whose estate she happens afterwards to inherit.—Whenever a woman becomes security for another person, in any of the foregoing eight cases, we say, the suretyship will be valid, and she will be bound to comply therewith. (1)

LAW 4.

Of those who become security for minors.

Where a man becomes security for a minor under twenty-five years of age, and any fraud be practised upon the minor, in relation to the matter concerning which the suretyship was contracted; neither the minor, nor his security, will be bound by the contract, so far as the fraud extends; but on the contrary, we say it ought to be rescinded. But if there be no fraud in the matter about which the contract of suretyship was entered into; although the minor may avail himself of the rights secured to him, on account of his minority, and rescind the contract or agreement, as being prejudicial to him; nevertheless the security will remain bound by his suretyship, and can not, for the same cause, excuse himself from the performance of the obligation; nor can he recover of the minor, any thing he may have paid in that respect.

(2) *R. l. 7, tit. 3. b. 5.—C. art. 23. 24. p. 264.*

LAW 5.

Concerning what things, and in what contracts, security may be given.

Security may be given for every thing, and in all the contracts, for, and in which a man can obligate himself. And we say, that there are two sorts of obligations in which security may be given. The first is, where he who contracts the obligation remains bound, and may be compelled to comply with it. And this obligation is called in latin, *civil* and *natural*, which means an obligation contracted according to law and nature. The second is, that which is purely *natural*, such as the obligor is naturally bound to perform, although he can not be compelled thereto, by a judgment of court: as where a slave promises to give or to do something; for although he can not be compelled judicially to perform his promise, as he can not appear in court, yet as a man, he is *naturally* bound to perform it. Wherefore we say, that every man who can obligate himself, in either of the above mentioned ways, may give security therefor, and such security, however unwilling, would be bound to pay for the principal. (1)

LAW 6.

In what manner suretyship may be contracted.

A man may become security where the creditor says to him: "will you be security for such a thing

(1) *R. l. 2, tit. 16, b. 5.—C. art. 2, p. 428.*

which such a one has to give to, or do for me?" and he answer "yes;" or say: "I am his security and I consent to become so;" by answering in this way, or by other similar words, he will become obligated in the same manner, as the principal debtor himself. And a man may, if he choose, become security, before the principal himself is obligated: as if he should say to any one: "If you will give so many maravadis to such a person, I will be his security therefor." Or he may become so at the same time that the principal debtor obligates himself, by saying: "I am security for the sum of money or thing, for which such a one obligates himself;" or afterwards by saying: "I am security for such a thing which such a person is bound to give to, or do for you." And in whichever of the above ways one man becomes security for another, the suretyship will be valid: Likewise a man may become security for a determinate time, as where he says, "I am security for such a person, until such a day:" or he may become so, conditionally, by saying: "I am security for such a person, if such a thing should happen." And such, or other similar suretyship, will be valid until the day, or time fixed, or in the manner it may have been stipulated. (1)

(1) *R. l. 2, tit. 16, B. 15.*

LAW 7.

That the security can not obligate himself in a greater sum than the principal is bound for.

The security can not obligate himself in a greater sum than the principal debtor is bound for; and if he should, the suretyship will be void for the excess: this may happen in four ways. The first is, where the security obligates himself, for more than the principal debtor owes; as where the latter owes one hundred maravadis only, and the other becomes security for one hundred and twenty, or for any other sum above the hundred: then the suretyship would not be obligatory for the excess. The second is, where the principal debtor is bound to give a thing in a certain place, and the security obligates himself to give it in another less convenient; then the suretyship will not be valid. The third is where the debtor is bound to give the thing at a certain time, and his security obligates himself to give it, at a shorter time: as where the former is bound to give it at the end of two years, and the latter obligates himself to give it at the expiration of one: such suretyship, we likewise say, would not be valid. The fourth is where the principal debtor is bound to give the thing under some condition, and the security obligates himself to give it purely and unconditionally: Such suretyship will not be valid, because the security had obligated himself for more than the principal debtor had done. (a)

(a) The suretyship which exceeds the debt, or which is contracted under more onerous conditions, is not null, but ought to be reduced to the terms of the principal obligation. C. art. 3. p. 428.

LAW 8.

What is the force of suretyship by which several persons have bound themselves jointly.

Where several persons become securities jointly, and obligate themselves, each for all, to give to, or to do something for another; they will be bound to perform the obligation in the manner they had stipulated: so that he in whose favour the suretyship was contracted, may demand of all, or of each one of them in particular, the whole of the debt for which they had become securities; and payment made by one of them, will discharge the others. But if they had not obligated themselves, each one for all, but had simply said: "we are securities for such a one, to pay or to do such a thing:" in that case, if they should be all able to pay the debt, at the time it is demanded; then we say that the creditor can not claim the whole debt of each of them individually, but of each, his proportional part only. But if either of the securities should be so poor, as not to be able to pay his part; then the others, whether one or more, who have the means, will be bound to pay the principal debt, or to perform the thing for which they had become securities. (1)

LAW 9.

That the debt ought to be demanded of the principal debtor, before it is of the security.

If the principal debtor live in the place, the debt ought to be demanded of him, before it is of his secu-

(1) *R. l. 1, tit. 16. B. 5—C. art. 12, p. 430,*

rities ; and if he should not have wherewith to pay, then it may be demanded of the securities. But if the securities happen to be in the place, and the principal debtor not ; and recourse be first had against the securities, and they petition for a delay, in order that they may bring forward the principal debtor ; it ought to be granted to them. And if they do not produce him before the expiration of the time, then they ought to answer to the suit, and pay each of them, his part of the debt, or the rich for the poor, or one for all, in the manner prescribed in the preceding law. And the delay here spoken of, must be granted by the judge before whom the debt is demanded, according to his discretion, (*alvedrio*) ; regard being always had to the time necessary for producing the principal debtor. (1)

LAW 10.

That where two men become principal securities for a debt, they ought to pay it.

When several persons obligate themselves jointly, one for all, making themselves principal debtors, to give to, or to do something for another ; if they should be all in the place, where the creditor wishes to demand the debt, he can not claim the whole of it, from one only of them, notwithstanding each may have become security and debtor for the other : but he should, on the contrary, compel each of them to pay his part, if able to do so. And if some of them should happen

(1) C. art. 7, p. 428

not to be in the country, (*tierra*), or any of them not able to pay; then they who are present, and who have the means of paying, whether they be one, two, or more, ought to pay the whole of the debt. (1)

LAW 11.

That he who is paid by one of the securities, ought to assign to him the right of claiming reimbursement from the others.

If one of the securities pay, in his own name, the whole of the debt, he may require of the person to whom he paid it, to assign to him the right of claiming it, as well of his co-securities, as of the principal debtor, and it ought to be assigned to him accordingly; after which, he may, at his option, require each of the other securities, to reimburse him the part he had paid on his account: and if either of them should be so poor as to be unable to pay it at that time, he may require him to give security that he will pay it as soon as he is able. He may moreover require the principal debtor to reimburse the part he had paid on his account. And if he should not choose to proceed in this way, he may demand the whole of the debt of the principal debtor, although the creditor had not granted him any power to that effect. But if one of the securities pay the whole of the debt, in the name of the principal debtor, and not in his own; then the creditor who receives payment, can not grant him the pow-

(1) *R. l. 2, tit. 16, B. 5. C. art. 7, p. 423.*

er to claim any thing of the other securities: in as much as the right he had of claiming the debt of them, or of assigning his rights to the person who paid him, had become extinct, by the security's having paid in the name of the principal debtor, But the security who pays the debt in this manner, retains his right of demanding reimbursement of the person for whom he became security. And if one of the securities, pay the whole of the debt, purely and simply, without declaring whether he pays it in the name of the principal debtor, or in his own, and he immediately, on making payment, require of the person, to whom he makes it, to assign to him the right to demand what he so pays of the other securities; we say that the assignment ought to be made accordingly: and if he should not then require it to be made, it ought not to be made to him afterwards, as it is to be presumed that he paid in the name of the principal debtor, and not his own: nevertheless he may claim of the debtor what he had paid on his account. (1)

LAW 12.

That the principal debtor is bound to reimburse the security what the latter has paid for him.

If one man request another to become his security, or if this other become so, of his own free will, in the presence of the principal who makes no opposition to it; or if he become security in another place, without the knowledge or command of the principal, who, when

(1) C. art. 19, p. 432—*ibid* art. 151, p. 299.

he is informed of it, assents thereto ; or if he become security for him, without his command, concerning a thing which the principal was bound to give, or to do, and which was to his advantage, although he should not have consented to it : in whichsoever of these ways one man becomes security for another, the suretyship will be valid. And whenever the security pays for the person for whom he became security, such person will be bound to reimburse him, except in three cases. The first is, where the security pays the debt, with the intention to make a present of it to the person for whom he was security ; or of paying for him, without ever intending to claim any reimbursement. The second is, where the suretyship is contracted for the benefit of the security himself. The third is, where one man becomes security for another, against the orders of the latter ; as if he should say, “ I do not ask you to become my security, but on the contrary, I forbid you ;” or should utter some other similar words. (1)

LAW 13.

That he who orders any person to become security for another, ought to pay such person for all the loss he suffers on account of the suretyship.

Where one man becomes security for another, neither in his presence nor by his command, but at the instance of a third person ; we say, that if the security should have any thing to pay on account of the person for whom he became security, he can not claim it of the latter, but of the person by whose command he

(1) C. art. 14, p. 430.

became security. Yet if at the time he became security, the principal were present and made no opposition thereto; or if he became his security, out of his presence, and the suretyship should turn to the profit of such principal; then it will be at the option of the security, to demand reimbursement of what he had paid, either of him for whom he had become security, or of the third person by whose command, he had entered into the suretyship, and both of them will be bound to pay accordingly.

LAW 14.

For what causes the suretyship may be annulled, and the security discharged.

The securities can not apply to the judge in order to compel their principal to release them from the suretyship, before they have paid something of the debt for which they had become security, except in five cases. The first is, where the security is condemned to pay the debt, either wholly or in part. The second is, where he has already been security for a long time; the duration of which, ought to be fixed at the discretion of the judge. The third is, where the security, seeing the time of payment approach, and wishing to incur no penalty, either on his own account, or on that of his principal, and being willing to pay, while the debtor is unwilling, for some cause, to receive payment, or perhaps is not in the place, deposits what he owes in some church or monastery, or in the hands of some good man, before witnesses. The fourth is, where the time has elapsed, for which the security had stipulated

his suretyship should endure, when he contracted it. The fifth is, where the person for whom he became security, begins to dissipate his estate. In either of the above mentioned cases, the suretyship is dissolved, and the security may compel his principal to release him from it. (1)

LAW 15.

That the securities ought to avail themselves of their own, or their principal's means of defence, in any suit instituted against them.

Where the security is sued for the debt, and knows that his principal has a sufficient defence, if pleaded, to overthrow the action, and he does not avail himself of it, and judgment be rendered against him; although he may then pay the debt, he can not afterwards claim any reimbursement from his principal; for it is to be presumed that he acted fraudulently, in order to cause his principal to lose his rights. And so we say it would be, where the security did not make use of the means of defence which he had, and which if pleaded would have availed him, as well as the person for whom he was security: as where the creditor had agreed with the principal debtor, or with the security, never to demand the debt of them, or had made some other agreement by which the action could have been defeated, and the security, knowing of the defence, did not choose to plead it in bar. And although we have said, that where the security had any means of defence, on his own account, and would not plead them, when he was

(1) C. art. 18 & 20, p. 340, 432.

sued for the debt, and that he would thereby lose his recourse against his principal, for what he had paid for him; yet there are cases in which it is otherwise: as where the defence appertained exclusively to the person of the security, and not to the principal; as if the security be a woman, who, as such, might legally defend herself when sued, not being obliged to answer thereto, in as much as the suretyship contracted by a woman would not be valid, except in certain cases; nevertheless, if she should not choose to avail herself of such defence, still the person for whom she became security, would be obliged to reimburse her for all she might pay for him. And so we say it would be, where the exception appertained exclusively to the person of the principal, and not to the security: for although the security might defeat the action by pleading such a defence, nevertheless the principal will be bound to reimburse him for all he has paid on his account. (1)

LAW 16.

That the suretyship is not extinguished by the death of the security.

If the security die, his heirs will remain bound to comply with the suretyship, in the same manner he was himself while living: and every means of defence or personal right that he may have had, according to what we have said in the preceding law, pass to his heirs, who may plead and exercise them, as he ought or could have done. We likewise say, that if the se-

(1) C. art. 21, p. 432.

curity or his heirs pay the debt, for which they are bound, of their own free will and without a judgment, or any compulsion; the principal will be as much bound to reimburse them therefor, as if they had paid in virtue of a judgment: but if they pay it before it become due, they can not require the principal debtor to reimburse them, before the day of payment, agreed upon has arrived.

LAW 20. (a)

Of the thing which one man commands another to do, for the advantage of the former.

Men sometimes do things by the command of others, whereby both become obligated, as well he who acts, as he who commands. This is another species of obligation, (b) resembling that of suretyship: it may be contracted in five different ways. The first is, where the mandate is given solely for the benefit of the person who orders the thing to be done; as where he orders another to take care of all the property he had in any place; or to buy, or to do for him, any specific thing; or to become security for him, or orders him to do any other similar thing: for if the person who is ordered, accept the mandate (*mandamiento*), he is bound to execute it. And if the mandatary pay or expend any thing, in executing it, the person under whose orders he acted, will be obliged to reimburse him.

(a) The three preceding laws are not in force: for their several heads, see the index to this title.

(b) This sort of obligation or contract, is what is called *mandate*:

We likewise say, that if the mandatary commit any fraud in the execution of the mandate ; or if the person under whose orders he acts, sustain any damage, through his fault, he will be bound to make full satisfaction for the same : for men accept of such mandates in order to serve and not to injure one another. (1)

LAW 21.

Of the thing which a man orders to be done for the benefit of a third person only, or for his own benefit and that of another person.

The second species of mandate of which we spoke in the preceding law, is where a man orders a thing to be done, neither for his own nor the mandatary's benefit, but for the benefit of a third person ; as if a man should say to another : " I command you to take care of the things which such a one has in such a place ; or to buy, or do such a thing for him ;" (expressly naming it ;) " or to become security for him ;" or where he should order him to do some other similar thing. For if the person so ordered, accept the mandate, in order to please him who gave the order, he ought to endeavour to execute it faithfully, and to the best of his ability : and if in so doing, he should pay or expend any thing on that account, the person who gave him orders to act, will be bound to cause him to be reimbursed. And if the third person for whose benefit the order was given, should sustain any damage by

(1) C. art. 1, 2, 16, 17, 29, ff. 420, 422, 424.

the fault or fraud of the mandatary, he may claim the amount thereof of the person who gave the order, and he will be bound to indemnify him : And all that such person may have to pay on that account, he may recover of the mandatary, as it was by his fraud or fault that the damage happened. The third sort of mandate, is where one man orders another to do any thing, for his own advantage and that of some third person : as if he should say : “ I order you to take care of the things which such a one and myself, have in such a place ; or to buy such a vineyard, or to do such a thing for him and me ; or to become security for us ; ” or should order him to do any other like thing ; for if the mandatary accept the mandate, he will be bound to execute it, well and faithfully. And if he should expend or pay any thing on that account, the mandator will be bound to reimburse him ; likewise the third person named in the mandate, ought to contribute his part, if what had been thus paid, turned to his profit. And if the mandatary commit any fraud in the business, with which he was charged ; or any damage or injury arise from his fault, he will be responsible therefor, to the person from whom he received the mandate.

LAW 22.

Of a thing which one man orders another to do, for their mutual benefit.

A thing may be ordered to be done, for the benefit both of him who gives, and of him who receives the order : this is the fourth species of mandate, of which

we before made mention ; as where a man has need of money, and requests or orders a Jew, to give, or lend it, on interest, either to himself, or his steward, or attorney in fact. This mandate is for the advantage of him who gives it, as he applies the money to those things which he orders his steward or attorney to do ; so likewise it is advantageous to the mandatary, as he derives interest from the money he lends : wherefore we say, that he who gives the order, is bound to repay the mandatary what he had lent, together with the interest : For as his steward or attorney had received the money by his orders, he is bound in the same manner, as if he had received it himself. The fifth sort of mandate is, where one man orders another to give, or to do something, for the benefit both of the mandatary and of some third person ; as if he should order any one to lend his money on interest, to some third person whom he mentions by name. In this case, we say, that if the mandatary can not recover the money from the person who received it, he may claim it of the person by whose orders he lent it. And so it would be if one man should order another to lend a sum of money to a third person, without interest, or for any other advantage he expected to derive from the loan.

LAW 23.

Of the thing which one man orders another to do, for the benefit of the mandatary.

It sometimes happens that one man orders another to do a thing, solely for the benefit of the mandatary ;

as where he says to him ; “ I advise, or command you, to buy a vineyard, or an estate, with the money you have ;” or where he commands him to buy or to ameliorate any other similar thing, and he do it accordingly, and sustain damage thereby ; the person who gave the order or advice, will not be responsible for the same : and this because such a command is considered rather in the nature of advice, than as a command, and it behoves the mandatary who receives it, to consider whether or no it be for his advantage, before he executes it ; for no person is bound to take the advice of another, unless he choose : wherefore he who gave the order or advice, will not be prejudiced thereby, unless it should be made to appear, that he gave it maliciously, or fraudulently ; for then he would be obliged to pay all the damage that happened on that account.

LAW 24.

In what manner the mandate ought to be made.

The mandates which men execute for one another, and of which we spoke in the preceding laws, may be made in many different ways ; as where the person who gives, and he who receives the mandate, are both present : or where it is given by means of letters (*carta*) or messengers, when the parties are not in the same place. It may be given for a certain day, or under condition : for a certain day, where one man orders another verbally, in writing, or by messenger, to feed and clothe such a person, until a day fixed : under condition, where he says : “ if such a thing happen,

then give to such a one, so many maravedis, or such a thing.” These mandates here spoken of, may be contracted where one man addresses another in such words as these : “ I request, or command, or wish you, to give such a sum of money, or to do such a thing, or to become security for me. By these and other similar expressions, by which it can be understood that he who gave the mandate, did it with the intention of obligating himself, the mandator will be bound, as also he who received the mandate. And if any one, after having given a mandate, in such terms, as are above mentioned, should pretend that he did not give it, with the intention of obligating himself, he ought not to be heard ; unless he can prove by those who were present, when the mandate was given, that he did not intend to obligate himself ; a sort of proof, very difficult to make. (1)

LAW 25.

What are, and what are not the expenses that a man may recover, when he has incurred them by the command of another.

Where a man receives a mandate from another, to do any lawful act, and he have any thing to pay in that respect ; the person who gave the order, will be bound to reimburse him therefor. But if the mandator should command him to commit theft, robbery, or homicide ; or to burn a house, a harvest, or to do any other harm wrongfully to any one, and the mandatary should pay

(1) *R. l. 2, tit. 16, B. 5.—C. art. 6, p. 422.*

any thing, in that respect, the mandator would not be bound to repay him the same: nevertheless both of them will be obliged to pay any third person, for the whole of the loss and damage he had sustained, on account of such a mandate. We likewise say, that if a minor under twenty-five years of age, order any other person whatever, to become security for a concubine or a woman of bad life, with whom he had commerce, or to furnish her with clothes or jewels or any other thing, and the mandatory incur expenses on that account, the minor will not be bound to reimburse him the same, if he should not choose to do so, in as much as they were incurred to the prejudice of the minor, and for a thing improper and evil in itself. (1)

LAW 26.

Of the things belonging to one person which another takes under his care.

A man may absent himself from his place of residence, and go into other parts, and through neglect or forgetfulness, omit to put his houses or estate under the care of any person, to administer or cultivate for him; and some one remaining in the place, may voluntarily, and without any order to that effect, undertake, on account of his relationship to, or regard for the absent person, to take care of and manage his estate and other things which he has thus abandoned, (a)

(1) R. l. 22, t. 11, B. 5.

(a) This sort of agent is what is called *negotiorum gestor* in Latin.

and sometimes expend his own funds for that purpose, or derives fruits therefrom, and convert them to his own use. We therefore say, that if any one expend money in this manner for the advantage or amelioration of the estate or property of another and in his name, the owner will be bound to reimburse him therefor, in the same manner as if he had acted under his orders. And the agent, on his part, will be bound to return to the owner, what he had gathered from the estate, over and above the expenses he had thereby incurred, by rendering him a true and faithful account of the whole. (1)

LAW 27.

Of things belonging to the king, to minors, or to any corporation which are taken care of or administered by other persons, without any mandate to that effect.

If the guardian of a minor, the attorney or steward of the king, or of any other person, or of a corporation, who has in care and whose duty it is to manage the affairs of such persons or corporations, should absent himself and go into other parts, without leaving the things thus entrusted to him, in the charge of any one; or if he should remain in the place, and neglect to take care of them, and any of his friends or relations, in order to save him from the damage he might thereby sustain, should take upon himself the management thereof and incur expenses on their account, for the

(1) C. art, 9, p. 320.

benefit of the owners of them, he ought to be reimbursed, either by the person who had the estate under his charge, or by the owners of the same. And we moreover say, that he who takes upon himself, the care or administration of such things, ought to render an account thereof, either to the person under whose charge they were, or to their owners, of whatever he had gathered therefrom, over and above the expenses, as we have said in the preceding law.

LAW 28.

Of the distinction that exists with respect to the expenses incurred on account of things belonging to other persons, without their orders.

There is a distinction between the expenses which men incur in managing the things of others, without their orders: for there are some which at first appear to be for the benefit of the things, and afterwards prove not to be so; and there are others which are useful in the beginning, and continue to be so afterwards: and there are others again that are necessary and proper in every respect, lest the thing should be lost or deteriorated. We therefore say, that if a man incur, in good faith, any of the above expenses, in taking care of the things of a person who is not a minor under fourteen years of age, that he may recover them from the owners thereof. But if they were incurred for the benefit and advantage of the minor, and were necessary or useful to him in the beginning, and continue to be so, as we have above said, he who incurred the same, may recover them from the minor. And if they were incur-

red for things which appeared useful in the commencement, but did not continue to be so, as is said in the beginning of this law, then the minor will not be bound to reimburse such expenses, but he who has the things under his care, (a) must pay them out of his own effects.

LAW 29.

That they who administer the things of another, with evil intentions, ought not to recover the expenses they incur on that account.

Men ought to be moved by good intentions when they administer the things of others, and by a desire of obliging and not of gaining from or robbing the owners of any part thereof. We therefore say, that if it can be certainly known that any one undertook such administration, with evil intentions, and if it should appear that he had not taken proper care of, or ameliorated the things which he thus administered, so as to derive therefrom the amount of the expenses incurred in their management, he ought to lose such expenses, and the owner of the things will not be bound to pay the same. But if it should appear that in administering the things, he had made profits sufficient to pay the expenses and leave an overplus to the owner, then he may retain such expenses. And we also say, that if any loss or damage happen to the things which he thus administers, he will be bound to pay the whole

(a) *De Gestore voluntario intellige.* Gregorio Lopez.

amount of such loss or damage, in whatever way it may happen : and this because he had taken charge of them in bad faith, and with the intention to commit theft or fraud.

LAW 30.

That the damage or deterioration which happens to the things of another, through the fault of the person who administers them, must be supported by the latter.

Every man who chooses to take upon himself the administration of the things of another, should take care of and manage them honestly and in good faith, in such a manner that they be not lost or deteriorated, through his fault or fraud : for if any thing should be lost or damaged, by that means, he will be bound to pay therefor. But if he was induced to take the administration of the things, because he had found them in such abandoned condition, that no person was willing to take charge of them, and in order to prevent loss to the owners or the persons who had care of them, then he will not be bound to pay for what is lost by his fault : unless it should be proved that it happened through some fraud he had committed.

LAW 31.

Of the things which a man undertakes to administer, believing that they belonged to one of his friends, when in truth, they belonged to another.

Where a man believes that he is administering the things of one of his friends, when in truth, they be-

longed to another person, without his knowledge, the owner will be bound to reimburse him, for all the expenses he may incur in administering them, in the same manner as if he had acted in his name, or through friendship for him. We moreover say that he who takes upon himself the administration of the things of another, in the manner above mentioned, is bound to render an account of them to the owner, after deducting the expenses of the administration, in the same manner as if they had been incurred at the request of the owner himself.

LAW 32.

Of the payment which a man receives or makes in the name of another.

When one man receives a sum of money or any thing else, in the name of another, whether it was due to the person in whose name he received it or not, and the latter ratify the payment, after he is informed of it, then he who received it, will be bound to deliver it to the person in whose name it was paid to him. And if he had incurred any expenses in recovering or transporting the thing, he ought to be reimbursed therefor by the person in whose name he acted. And if the debt which is thus paid, were really due, as we have above said, the debtor will be thereby entirely acquitted of it. We also say that if a man pay a debt which another really owes, as soon as it is paid, the debtor remains free and discharged therefrom, though it were paid without his order. But he for whom the payment

was made, is bound to reimburse the other what he had paid for him, in the same manner as if this other had paid it by his command.

LAW 33.

That he who administers the things of others, ought not to buy or do what the owner himself was not in the habit of buying or doing.

If any one take upon himself the management of the things of another, he ought to administer them faithfully and diligently, especially when he does it, without the mandate of the owner, taking care not to buy or to do any thing which the owner himself was not in the habit of buying or doing: for if he act otherwise, and any loss or damage arise from what he so buys or does, whether it happen through accident or in any other manner whatever, the whole will be on his account and not that of the owner. We moreover say that if any profit be derived therefrom, it will appertain to the owner; yet the other may recover all the expenses he had incurred in that respect.

LAW 34.

That he who administers the things of any one, which another wished to administer and which this other abandoned to him, ought to be diligent in managing them.

Where a man wishes to take the administration of the whole estate of one of his friends, through the affection or relationship existing between them, with the intention to do it well and faithfully, and then another person should present himself, saying: "I wish to administer this estate," and he who first desired the ad-

ministration, should yield to the second; in such a case, the latter will be bound to administer it, in the same manner as the other intended to do, so that nothing may be lost or deteriorated through his fault, fraud or neglect: And if he act otherwise, he will be obliged to pay all the loss and damages which may happen through his misconduct.

LAW 35.

That he who is induced through piety to rear up an orphan and to administer his estate, cannot afterwards recover the expenses he had incurred in that respect.

A man is sometimes moved by piety, to receive into his house an orphan who had been abandoned, and furnish him with necessaries and expend his own funds in administering his estate, while he remains with him, and he may afterwards desire to recover what he has thus expended, out of the effects of the orphan; this we say he cannot do: for in as much as he was induced to rear him up, through compassion and piety, it is to be presumed that he expected to receive his reward from God: therefore the orphan will not be bound to pay him any thing for the favors he had bestowed, nor for the expenses he had incurred in administering his estate; nevertheless he ought to serve, honor and respect his benefactor, during all his life.

LAW 36.

In what cases the mother or grandmother may recover the expenses she had incurred in rearing up her children or grand children, or in administering their estates.

If the mother or grandmother have her children or grand children under her power, as well as their estate, after the death of their father, and should feed, clothe and furnish them with other necessaries; if they should possess sufficient means for their support, then the mother or grandmother may recover, out of their estate, the expenses she had incurred on their account. But if the children should not possess means of their own, to maintain themselves with, then the mother or grandmother ought to provide for them, by a natural impulse and not with the view of recovering what she might expend for them. If, on the contrary, the children be so rich as to be able to live with ease, upon their own estate which is not in the possession of the mother or grand-mother, and she have any of them under her power and furnish them with whatever they stand in need of, after having made a declaration or protest (*afrenta*,) that she intends that the expenses which she incurs on their account, should come out of their own estate, in that case, she may recover them accordingly. But if she should not make such declaration or protest (*afrenta*,) as is above said, then she can not recover them.

LAW 37.

Whether the step father or any other person can recover the expenses he incurs in administering the estate of his step-son, or of any child not his own.

If the step-father keep his step-son in his house, and feed, clothe and furnish him with other necessaries, having declared (*Faziendo afrentas*) that he intends to recover the expenses he incurs in that respect ; then he may recover them, out of the effects of the step-son, if any he have. But if the latter be of such an age as to be of service to his step-father, then, notwithstanding he may make a declaration in the manner above stated, yet he ought not to recover the expenses he incurred in maintaining him : for it is but just that the services of the step-son, should balance the expenses incurred on account of his person. But if the step-father had expended any thing usefully in administering the estate of his step-son, he may recover the same. And that which we say in this law, with respect to the step-father, applies equally to all other persons who maintain or provide for other children than their own, and administer their estates.

TITLES

**Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETA PARTIDAS, on
Pledges.**

- | | | |
|---|---------|---|
| Digest lib. 20. tit. 1. | - | <i>De pignoribus et hypothecis, &c.</i> |
| Digest lib. 20. tit. 2. | - | <i>In quibus causis pignus, &c. ta-</i>
<i>cite contrahitur.</i> |
| Digest lib. 20. tit. 3. | - | <i>Quæ res pignori, &c. datæ obli-</i>
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| Digest lib. 20. tit. 4. | - | <i>Qui potiores in pignore, &c. ha-</i>
<i>beantur, &c.</i> |
| Digest lib. 20. tit. 5. | - | <i>De distractione pignorum, &c.</i> |
| Digest lib. 20. tit. 6. | - | <i>Quibus modis pignus, &c. solvitur.</i> |
| Code lib. 8. tit. 14. | - | <i>De pignoribus et hypothecis.</i> |
| Code lib. 8. tit. 15. | - | <i>In quibus causis pignus, &c. ta-</i>
<i>cite contrahitur.</i> |
| Code lib. 8. tit. 16. | - | <i>Si aliena res pignori data sit.</i> |
| Code lib. 8. tit. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. | | |
| 28. 29. 30. 31. 32. 33. 34. 35. | | |
| Novels Coll. 5. tit. 7. | - | <i>Ut non fiant pignorationes pro</i>
<i>aliis personis, &c.</i> |
| Domat's Civil Law | - | part 1. book 3. tit. 1. |
| <i>Fuero viejo</i> | - - - - | book 3. tit. 5 & 7. |
| <i>Fuero real</i> | - - - - | book 3. tit. 19. |
| <i>Leyes del Estilo</i> | - - - - | ll. 4. and 243. |
| <i>Ordenamiento de Alcala</i> | | tit. 18. |
| <i>Ordenamiento Real</i> | - - | book 5. tit. 12. |
| <i>Recopilacion de Castilla</i> | - | book 5. tit. 17. |
| Civil Code | - - - - | book 3. tit. 18 & 19. |

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TITLE XIII.

Of the pledges (Penos) which men sometimes take in order the better to secure the execution or payment of what another has promised to do or to pay.

LAW 1.

What is meant by pledge, and how many kinds there are.

A pledge, properly so called, is the thing which one man pawns to another, by delivering it into his possession, especially when it is moveable. But according to its most extensive legal sense, every thing whether moveable or immoveable that is affected in favour of another, may be called a pledge, although it should be not delivered to him to whom it is pledged. And there are three sorts of pledges. The first, is that which men voluntarily contract among themselves, by which one pledges any thing belonging to him to the other, to ensure the execution of that which he is bound to give or to do. The second, is where the judge orders one of the parties to be put into the possession of the property of his adversary, either because the latter had failed to answer, or was in contumacy, or on account of a judgment rendered against him or to enforce an order from the king. This last sort of pledge is made by compulsion, and both of the species above mentioned are contracted by words and expressly. The third kind is that which is contracted tacitly, without intervention of words, as will be hereafter

shewn with respect to the property of the husband which is affected as a pledge for the dowry of his wife ; with respect to the estate of those who are bound to the king, on account of the rents and imposts they receive for him, and so with respect to all other similar cases of which mention is made in the laws of this title. (1) (a)

LAW 2.

What are the things which may be given in pledge.

Every thing, whether it be in existence or not, may be pledged ; as the child of which a slave is pregnant, the young of cattle, the fruits of trees or of estates, and all kinds of rents which men possess, whether of a corporeal or incorporeal nature. But whoever holds any of the above mentioned things in pledge and gathers any fruits or revenues therefrom, ought to deduct the same from what he had given upon the pledge or deliver them to the owner of the thing. We likewise say, that a man may pledge the debts due to him from another person, with all the rights he has in them ; and the pledgee may recover them either in or out of court,

(1) *R. l. 1, tit. 11, b. 4.—C. art. 1, f. 446.—ib. art. 1, 2 & 4, f. 452.*

(a) When the thing given in pledge is delivered into the possession of the creditor, it is called in Spanish *prenda*, that is to say a pledge ; and when it is not delivered into his possession, it is called *hypotheca*, that is a mortgage. Febrero adicionado vol. 2, part 1, ch. 7, § 4. no. 34. p. 43 & 44. This distinction is preserved in the civil code, with this difference, that moveable things only can be given in pledge, while none but immoveable things and slaves can be mortgaged.

in the same manner that the pledgor himself could have done. (1)

LAW 3.

What are the things that neither ought nor can be given in pledge.

Things holy, sacred or religious, such as churches, tombs and other similar things, cannot be either given or in any ways affected as a pledge; unless in particular cases, according to what is said in the title of our first *Partida*, which treats of things of holy church. We likewise say that a free man cannot be pledged; and he who received him as a pledge, shall lose all he had given on that account, and shall pay to him as much more out of his own effects, or to his relations, if he should not be living. (2)

[No other part of this law in force.]

LAW 4.

That things put on an estate especially for the cultivation of it, can not be given in pledge.

We prohibit any one from taking in pledge either oxen, cows or other beasts of the plough, or the ploughs themselves, or the iron tools, or the other things necessary for cultivating the estate, or the slaves put thereon specially for that purpose, and we

(1) *C. art. 4, p. 446.—ib. art. 45, p. 448.—ib. art. 35, 36 & 37, p. 458.*

(2) *R. l. 7, tit. 2. b. 1.—C. art. 4, p. 446.—ib. art. 35, p. 458.*

forbid every judge or other person from presuming to seize or deliver them to any body. And whoever shall do so, will be bound to pay to the owner of them, all the loss and damage which he may sustain on that account. (1)

LAW 5.

What are the things that are not affected, although the owner should pledge the whole of his estate.

Although a man should pledge the whole of his estate, nevertheless there are certain particular things which are not affected thereby: such are the concubine (*Baragana*) whom he keeps publicly in his house and the children he has by her; the servants he keeps especially to attend him and take care of and rear up his children, and the other things in his house, which are daily necessary for the service of his person and family, as his bed and that of his wife, their wearing apparel and all other necessary cooking utensils of the kitchen as well as his arms and horse; and all other things which he possessed at the time of the contract or may afterwards acquire, except those above mentioned or others of like nature, if any he may have, remain affected by the pledge. (2)

(1) *R. ll* 25 & 28, *tit.* 21, *b.* 4.—*ib. l.* 5, *tit.* 17, *b.* 5.—*C. art.* 4, *fr.* 446.—*ib. art.* 35, *fr.* 458.—*ib. art.* 2, *fr.* 490.

(2) *C. art.* 2, *fr.* 456.

LAW 6.

In what manner things may be pledged.

Things may be pledged in the presence of the owner and of him who takes them in pledge, whether such things be where the parties are or in another place. And they may be likewise pledged through a messenger or by letters (*cartas*) in the absence of one of the parties, and in writing or without it. We also say that when a man pledges a thing, he ought to designate it by its name, mark, or measure, or in some other way, in order that it may be known with certainty what thing is given in pledge. (1)

LAW 7.

Who they are that can pledge a thing.

The owner of a thing who has the right to alienate it, may likewise pledge it to another person. We also say that if a man have any right upon a thing, (a) that he may pledge such thing, though he be not the owner of it. We further say that if a man expect to become the owner of a thing, and before he become so, he pledge it, and afterwards acquire the property of it; the thing will be as effectually obligated as if he had been both owner and possessor at the time he pledged it. We moreover say that if a man pledge a thing belonging to another person, without putting the pledgee in possession of it, and the latter knew that it

(1) *R. l. 2, tit. 16. b 5.—C. art. 6, p. 446.—ib. art. 5, p. 452.*

(a) As of an usufruct or the like.

did not belong to the pledgor; although he who pledged it, should afterwards acquire the property of it, nevertheless he would not have the right to demand it from the pledgee. But if the pledgee were in the possession of a thing at the time of the pledge and also when the other acquired the property in it, he may then retain it in pledge until he has recovered what he had given upon it. Again, if at the time he received the pledge he believed that the thing belonged to the pledgor and the latter afterwards acquire the property of it, then he may claim it of any person who has it in possession, in the same manner as if it belonged to the pledgor, at the time he pledged it. (1)

LAW 8.

That the attorney in fact, or the steward of any one, or the guardian of a minor, may pledge the property of such persons.

When the attorney in fact or the steward of any person pledges any thing belonging to his constituent, without his knowledge or command; or if the money he receive upon the pledge, be converted to the benefit of him whom he represents, and the thing be delivered into the possession of the pledgee; the latter may retain it until he recover the sum he had given upon the pledge. But if the thing had not passed under the power of the pledgee, although he may then demand reimbursement from the owner of the thing, the money had been converted to his benefit, as is above

(1) C. art. 32, p. 458.

said ; yet he can not require the delivery of the thing pledged. We also say that if a man who has the care of the estate of a minor, should be under the necessity of pledging any portion of it, for the benefit of his pupil ; he may pledge any of his moveable things, always converting to the advantage of the minor, the money he received on account of the thing pledged ; but he can not pledge his immovable property without the authorization of the judge. Yet if the guardian pledge any of his own property, to pay a debt due from the minor or for any other purpose, the pledge will be good against the guardian, notwithstanding the pupil may not be bound to pay the debt, in as much as it had not turned to his profit. (1)

LAW 9.

Whether a thing belonging to another person, can be pledged or not.

A thing belonging to another person can not be pledged without the owner's command : but if it should be pledged by any one and the owner after he knows it consent to or ratify the pledge ; or if he were present at the time the pledge was given and was silent and made no opposition to it, then the pledge would be as valid as if it had been given by himself or another person by his command.

(1) C. art. 34, p. 458.

LAW 10.

Whether a man can or can not pledge a thing which he has already pledged to another.

If a man pledge a thing belonging to him to one person, and he should afterwards wish to pledge it again to another, he can not do it without the knowledge and command of the first pledgee; unless the thing be of sufficient value to satisfy both debts: for then he may pledge it, without the knowledge of the first pledgee, for as much as it is worth over and above the first debt for which it is pledged. We also say that if any person pledge a thing for its whole value and afterwards pledge the same thing to another person with the knowledge and command of the first; (a) he will be bound to give another pledge to the second pledgee equal in value to what he had received from him. And moreover the judge of the place, may in his discretion, inflict upon him a penalty for the fraud he had committed in pledging the same thing to two persons for more than it was worth. And so we say it would be where a person pledges a thing belonging to another person, without the knowledge of the pledgee.

(a) This practice was considered as one of those frauds called *stezionate*.

LAW 11.

That no one shall seize the property of another, as a pledge, without the authority of the judge.

No man shall seize the property of another, as a pledge, without the order of the judge of the place, unless he had agreed with his debtor that he might do so, without judicial authority. And if any one contravene this provision of law, we think proper and we ordain that he return the thing that he has thus taken to its owner, and that he moreover lose the claim he had against the person from whom he took it.

[No other part of this law in force.]

LAW 12.

What agreements may or may not be stipulated relative to pledges.

Every agreement not contrary to law or good morals, may be stipulated relative to the things that are given in pledge; and any stipulation of a different nature would be void. We therefore say that if a man pledge a thing to another person, saying; "if I do not redeem this pledge by such a day, I consent that it shall become yours from that time, for what you have lent me, or that it shall be considered as if you had bought it from me:" such an agreement shall not be valid; otherwise no person would receive a pledge under any other condition, which would be of great injury to the country: for when a man is in great need, he will pledge his property for whatever he can get

upon it, wherefore he would sacrifice it by such an agreement. But if the agreement be made under condition, that, if the pledgor should not redeem the thing by a day fixed, that it should be sold to and bought by the pledgee for as much as it might be estimated by good men: such agreement we say will be valid, as we have said in the title of promises and obligations, in the laws which speak of that matter. (1)

LAW 13.

What is the difference between the pledges given by judges and those which men voluntarily give among themselves, and what right is thereby acquired.

There is a difference between the pledges which men give voluntarily to each other, on account of something they are bound to give or to do, and those which the judges cause to be delivered, in order to have their judgments carried into execution. For the things which a judge orders to be delivered in pledge, are not bound until they are actually put into the possession of the person to whom he orders them to be given. But the pledges which men voluntarily give to each other, as is above said, are, as soon as the contract is made, affected in favour of those who receive them. And if the things which the judge orders to be delivered in pledge, as is above said, should have been pledged by their owner to another person, before they were actually delivered to those to whom the judge ordered them to be given; then we say, that they to

(1) R. l. 2, tit. 16, b. 5.—C. art. 12, p. 448.

whom the things were last pledged, will have a better right to them than he to whom the judge ordered them to be delivered before he was actually put in possession of them. (1)

LAW 14.

What right a man acquires to the thing pledged to him.

If a man give in pledge the deed (*carta*) of donation or sale of one of his estates or houses, he is understood that he thereby pledges the estate or house concerning which the deed was executed, in the same manner as if he had delivered the thing itself to the pledgee. And we likewise say that when the thing is thus pledged, the pledgee may demand the actual delivery thereof, either of the pledgor or his heirs. And we say that if the pledgor, before he deliver the thing to the pledgee, should give, sell, pledge or alienate and deliver it to another person, the first pledgee may demand of the pledgor all that he had given him on account of the pledge: And if he can recover it from him, he ought to leave in peace the second pledgee who is in possession of the thing. And if he can not recover what he has thus given, he may then and not before, demand the thing pledged to him, of the person in whose possession he finds it: unless the pledgor had sold or alienated the same, after he had been sued for it by the person to whom he had pledged it: For then he may at his option immediately claim the debt

(1) C. art. 53, p. 464.

of the pledgor or the thing itself of the person in whose possession he finds it. (1)

LAW 15.

That a man retains his right upon the thing pledged, though it should change its condition or be ameliorated.

If the thing change its condition after it is pledged; as if it be a house and it fall down; or uncultivated land and the owner plant vines or trees on it; or if it undergo any similar change, nevertheless the pledgee will retain all his rights to the thing pledged. And if any person being in possession of such thing, without being the owner thereof, but holding it in good faith and believing it to be his own, should make any amelioration thereon, the pledgee could not deprive him of the possession of it, without reimbursing him the expenses which manifestly appear to have been incurred for the benefit of the thing pledged. We also say that if the pledgee make any amelioration on the thing pledged, or if it be increased in any manner, by accident; as where it is a field, or vineyard, or garden situated on the bank of a river, and earth be added to it by the overflowing thereof, such amelioration or increase happening to the thing pledged, in any of these ways, remain affected in favor of the pledgee, together with the principal thing pledged. But he ought to return the whole to the pledgor, when the latter shall

(1) C. art. 41, p. 461.

have paid him the debt as well as the expences, if any he had incurred on that account. (1)

LAW 16.

What right the pledgee has to the fruits produced by the thing pledged.

If the thing pledged be an estate, and the pledgor, while he is in possession of it, sow seed upon it; or if it be a slave that becomes pregnant; or cattle that becomes big with young; notwithstanding he may afterwards sell, pledge or alienate them in any other way, we say that the fruits of the things will be affected in favour of the pledgee, in the same manner as the thing itself. But if the alienee of the thing pledged, being in possession of it, sow seed upon it or it produce any other fruits, we say that such fruits will not be affected in favour of him to whom the thing was first pledged.

LAW 17.

What right a man has to a thing which is pledged under condition, or for a certain time.

Where a man takes a thing in pledge from another, under condition or for a certain day, the pledgee cannot require the delivery of the thing pledged until the condition shall happen or the day arrive. But if the pledgee should fear that the pledgor would depart from the country to go elsewhere, he may demand the

(1) C. art. 14, §. 448.

delivery of the thing, or that the other give him sufficient security for its delivery, on the happening of the condition, or when the day shall arrive. (1)

LAW 18.

What a man must prove, who alleges that a thing was pledged to him when it is denied by the person who has it in possession.

When a man sues another for a thing in his possession, alleging that it had been pledged to him, mentioning the name of the pledgor; if the defendant deny the pledge, or reply that the person said to be the pledgor had no right to pledge it; then the plaintiff will be obliged to prove two things: first, that the thing was pledged to him: secondly, that it belonged to the person whom he pretends had pledged it to him, or that he had the power to pledge it. And on proving this, the thing ought to be delivered to him. We also say, that if a man be in possession of a thing which is claimed by another, who alleges that it had been pledged to him; if then the former be willing to pay what is due to the person making the demand, the latter may be compelled to receive it. And we also say, that the creditor ought to assign over all his rights to the person who pays him, if he require it. (2)

(1) *R. l. 2, tit. 16, b. 5.*

(2) *R. l. 14, tit. 8, b. 2.*

LAW 19.

That the pledgee ought to be indemnified for the thing pledged when it is transported away, lost or deteriorated, after a suit is instituted therefor.

When a man is in possession of a thing which another claims, alleging that it was pledged to him by the owner; if after the proof of that fact, the person in possession of the thing, fraudulently convey it away, saying that he could not obtain it; then the judge should require the plaintiff to swear to the amount of the loss and damages he had sustained by its non-delivery (a); and for as much as he shall swear to, so much the judge shall command the other to pay, together with the debt due, after the judge himself had estimated the amount of such loss and damage, before he takes the oath of the party. Nevertheless, if the thing pledged should be lost by the fault and not the fraud of the person in possession of it, then he cannot be required to pay more than was due to the pledgee upon the thing. If, however, it should not have been fraudulently transported away nor lost by the fault of the possessor, who nevertheless is unwilling to deliver it; then it will be at the option of the pledgee, either to take the oath as is above prescribed and recover the debt, together with the loss and damages, or to require of the judge to seize upon the thing and put him in possession thereof. But if the thing

(a) It does not appear that this sort of proof by the oath of the party interested, can be received under the provision of the civil code. Art. 258 & 259, p. 458.

be in such a place that the possessor, though willing to deliver it, yet cannot do it; then he ought not to be condemned as is above prescribed, in as much as it was not transported away through his fraud. But he ought to give security to produce and deliver it to the pledgee on a certain day, or to pay the debt for which it was pledged. And we say the same rule ought to be observed in all cases mentioned in this law, when it is the pledgor himself who acts in such manner.

LAW 20.

That he who holds the thing in pledge, ought to pay for it, if it be lost or deteriorated by his fault.

He who receives a thing in pledge, ought to preserve it with the greatest care, so that it be neither lost nor deteriorated by his fault or neglect. And he should therefore abstain from making use of it, except in such way as not to diminish its value, and even then not without the order and consent of the owner. For pledges are chiefly given as a security to the pledgee for what he had advanced thereon, and not to be used by him. Wherefore we say that if any person contravene this provision of law, and the thing pledged be lost or deteriorated by using it against the wish of the owner, or be damaged in any other manner by his fault or neglect, he will be bound to pay therefor. But if such loss or deterioration happen by accident and not by his fault or fraud, he will not be bound to pay for the same, nor shall he, on that account, be prevented

from recovering the debt due him on the thing pledged. The pledgee, however, will be bound to prove the accident by which he alleges the thing was lost, after which he will be discharged from any demand on that account, and may recover what he had given up on the thing pledged as is above said, unless the owner can prove that the accident happened through the fault of him who held the thing given in pledge. For then, though the pledgee may recover the debt due him, yet he will be bound to pay for the thing, in as much as the accident by which it was lost, happened by his fault. (1)

LAW 21.

At what time the pledgee ought to return the thing he holds in pledge, to the pledgor.

If the pledgor wish to recover the thing pledged, he must first pay the sum he received, when he gave it in pledge, as well as all necessary expenses which had been incurred for its amelioration, or in order to prevent its loss or deterioration: as if the thing pledged be a beast, then the expenses of maintaining and shoeing it, and for other necessary things of the kind; or a house, then the necessary expenses incurred in rebuilding, ameliorating or repairing it; or an estate, then the necessary expenses for cultivating the same or any of the above purposes or the like, deducting therefrom the fruits which he had gathered from the

(1) C. art. 14, n. 448.

estate, or the rents of the house, if he lived in it. And after the debt, as well as the expenses, are paid in the manner above mentioned, then the pledgee will be bound to deliver immediately the thing to the pledgor. And if he do not deliver it accordingly, without assigning some good reasons therefor, he shall pay for the same, together with damages, and the pledgor shall be believed under his oath (*a*) as to its value, and the amount of the loss and damages he sustained thereby. The judge ought, however, previously to estimate the value of the thing and the amount of the damages, and fix a sum which, in his opinion, shall appear reasonable and just as the *quantum* on which the pledgor ought to swear, in order that his oath might not be taken for an unreasonable amount. (1)

LAW 22.

That he who lends his money to another, upon a pledge, and is reimbursed for the same, may nevertheless retain the thing pledged, for another debt due him from the pledgor.

If a man owe money to another, on a pledge, and afterwards contract in writing (*carta*) another debt towards the same person, for money received, but without pledge; then although he shall pay the first debt, yet if the pledgee be unwilling to return the thing pledged, until the second debt acknowledged by

(1) *R. l. 2, tit. 16, b. 5.—C. art. 11 & 14, p. 448.*

(*a*) See the note upon the law 19 of this title.

writing, should be paid, he may retain it accordingly, notwithstanding it had not been especially affected for the second debt. But this provision of law extends no farther than to the debtor or his heirs. For if the owner of the thing should pledge or sell it to another, while the first pledgee was in possession of it, then if the second pledgee or purchaser should say to the first ; “give me the thing which such a one pledged to you, and receive of me the sum you gave upon it:” in such case the first pledgee will be bound to take the sum he had given upon the thing, and deliver it up to the other ; and he cannot excuse himself from doing so, notwithstanding he should allege that the pledgor owed him another debt which he contracted in writing.

LAW 23.

In what cases the property of a man is bound as a pledge though there were no express stipulation to that effect.

Things may be bound to another expressly by words, as we have above said ; and also tacitly, by the mere act of the parties : as where a woman, for herself or another for her, promised to give a dowry to the person whom she is about to marry. For from that time, all her estate, as well as the estate of those who promised for her, will remain affected in favor of the husband, until the dowry be paid : notwithstanding at the time the promise was made, it was not said that the estates of either of them should be bound therefor. We likewise say, that the property of the

husband remains obligated to his wife, on account of the dowry he had received from her. And so we say that the estates of the guardians of minors who are under twenty-five years of age, remain bound, in every case, in favor of their pupils, from the day they enter upon the duties of their offices, until they render their account and deliver to them what they have received. And we say that the same rule ought to be observed with respect to those who receive the revenues of the king. (1)

LAW 24.

That the property of the father is bound in pledge to his son, for the amount he may have wasted of the estate of the latter, notwithstanding no express agreement had been stipulated to that effect.

Children may have property which belong to them separately, and which they have derived from their mother. And though such property ought to remain in the power of the father who may reap the fruits thereof, nevertheless he cannot alienate it in any manner whatever. But if he should alienate it, his estate would remain bound and pledged from the time of his death, in favour of his children, until they shall be indemnified for what he had so alienated or dissipated. And if his estate be insufficient to indemnify them, or if it had been incumbered by him or left in a dilapidated condition, then the children may claim and recover their estate from any person in whose pos-

(1) C. art. 53, ft. 332.—*ib.* art. 17 & 19, ft. 454,

session they may find it, provided they do not choose to inherit from their father: For if they do inherit from him, they cannot then claim their own property which was alienated as above said, because, as heirs, they are bound to observe and not contravene any lawful contract entered into by their father.

LAW 25.

That a thing bought with the money of a minor, will remain bound in his favour, as also the estates of those who have to pay taxes or rents to the king, are affected on that account.

Where any thing is bought with the money of a minor under fourteen years of age, such thing will remain bound in his favour, until he recovers the price for which it was purchased. We also say, that if any one be bound to pay a tribute to the king, all his estate will remain affected therefor, until the same shall be paid. And we moreover say, that the whole of the estates of those who collect the revenues of the king, or who enter into any contract of farming with him, or into any similar engagements concerning the collection of his taxes, as we above said, remains affected until the fulfilmentt of their agreemens with him. But the estates of their wives, as their dowries or those which belong exclusively to them, are not understood to be bound therefor. (1)

(1) *R. l. 9, tit. 3, b. 5.*

LAW 26.

That the estate of the mother is bound in favor of her children ; that of the testator in favour of the legatees ; and the house, ship or other thing, for the expenses incurred in repairing it.

If a woman, after the death of her husband, marry another man, the *arras* and donations which the deceased had given to her, become the property of the children of the first husband, and they may recover them after the death of their mother ; (a) and in order to secure them in this respect, all the mother's estate remains tacitly pledged in their favour. And so we say it would be, if the wife, after the death of her husband with whom she had children, she having them and their estate under her guardianship, marry a second time ; for then the whole of her estate, as well as that of her second husband, remain affected in favour of her children, until a guardian be appointed to them, and they render an account and deliver up what belong to the children. We further say, that the estate of any one who gives a legacy by will, remains bound in favour of the legatee, until the legacy be paid to him. And we also say, that if a man borrow money from another to fit out or repair a ship, or to build or repair a house or any other edifice, that each of these things

(a) The mother who marries a second time, having children of her first husband, still retains the usufruct of the *arras* and donations given to her by the deceased.

upon which the money was expended, remain bound in favour of the lender. (1)

LAW 27.

That he who first receives the thing in pledge, has a better right thereto, than he who receives it afterwards, except in certain cases.

It is just and proper that he who first receives a thing in pledge, should have a better right thereto than he who receives it afterwards. But there are cases in which it is otherwise: for if one man request another to lend him a sum of money, upon a thing which he gives him in pledge, obligating himself in writing or otherwise to pay him, and before he gets the money, pledges the thing to another person, of whom he immediately receives the money; then, notwithstanding the first pledgee should afterwards pay the money which he promised upon the thing pledged, yet it will remain bound in favour of the second pledgee. And this because the last pledgee first paid the money, and because the pledgor had the choice either to receive the money of the first pledgee, or to recant, if he was not pleased with the contract.

(1) *R. l. 4, tit. 1, b. 5.—ib. l. 3, tit. 2, b. 5.—ib. l. 1, tit. 4, b. 5.—C. art. 10, p. 60.—ib. art. 227, p. 258.—ib. art. 21 & 24, p. 456.*

LAW 28.

That he who lends his money, in order to refit or construct a ship or to repair a building, has a right to be paid on the thing itself, in preference to any other person.

When a man pledges a ship, house or other building to another, and afterwards borrows money of any third person, in order to repair and preserve it, and prevent it from being destroyed or deteriorated, and he accordingly expend the money for the benefit of the thing; then the second creditor, who had made the loan to preserve the thing, will have a better right to be paid upon the same than the first creditor, in as much as the money he has furnished, had been used for the preservation of the thing which might have been otherwise lost. We therefore say, that he ought to be first paid, notwithstanding the thing had not been expressly bound to him for the money he had lent. And so we say it would be, if he who last lent his money, had done it in order to furnish the vessel with arms, or other necessary things, or to furnish provisions to the mariners or to those who manage the vessel.

LAW 29.

That the rent of the store-house where merchandize is put, and the expenses of transporting them from one place to another, ought to be paid in preference to any other debt.

Where a man receives any merchandize in pledge, as oil, wine, wheat or other similar thing, and they be

stored in any house or magazine for which storage is to be paid, or should be transported from one place to another in a vessel or on beasts, or in any other manner, and any one should afterwards lend money to pay such storage or expenses of transportation; we say that he who last lends his money for any of these purposes, ought to be paid in preference to the first. And all we have said in this and the two preceding laws relative to the preference given to the last debt over the first, is understood likewise to apply to all other persons, unless the debt were contracted on account of the dowry or *arras* of the wife, or of an old debt due to the king's chamber (*camara del Rey*); (a) for these last two debts, if anterior, are to be paid in preference to the first.

LAW 30.

That a minor or any other person has the right to be reimbursed out of the things bought with his own money, in preference to any other creditor.

If a man obligate to another person, all his property, as well what he then, as what he may afterwards possess, and then buy any thing on his own account with the money of a minor: although the whole of his estate will be affected in the manner above said, nevertheless the minor will have a better right to the thing bought with his money, than the person to whom the whole of the estate was first pledged. We therefore

(a) The fisc.

say, that the thing thus bought, ought to be first delivered to the minor, in order that he may be paid the sum for which it was purchased, if it had been bought entirely with his own money ; and if not, then for as much as was paid for it, out of his own funds. We also say, that when a man has obligated all his estate in the manner above mentioned, and afterwards borrow money of any person to buy any thing with, agreeing with the lender that the thing bought with his money shall remain affected for the reimbursement of the same ; then the last creditor will have a better right upon the thing so bought with his money, than he in whose favour the whole estate of the purchaser was affected. We also say, that if a man expend money for the burial of any person deceased, notwithstanding the debt be posterior, it ought to be paid in preference to any other contracted by the deceased, while he was living.

LAW 31.

That he who exhibits a notarial act by which a thing is pledged has a better right to such things than he who produces only private writings or testimonial proof.

If a man execute a writing with his own hand, in which he acknowledges he had received money lent him by any one, and that he obligated something therefor, or enter into such an agreement before two witnesses ; then he, in whose favor the thing is affected in either of these two ways, may claim it of the pledgor or any other person in whose possession he finds it ; unless he who detains it allege that it was obligated to

him by an act executed before a notary public : for if he exhibit such an act, he will be preferred to the first pledgee, who had only a writing executed by the debtor himself or the proof of two witnesses, as is above said. But if the writing executed by the debtor, be subscribed by three witnesses with their own hands, then the first pledgee will have a better right to the thing than the second, who exhibits the public act.

LAW 32.

Who has the best right to a thing that is pledged to two persons.

If a thing be conditionally pledged, and before the condition is accomplished, the pledgor pledge it a second time to another person, after which the condition is accomplished ; the first pledgee will have a better right to the thing than the second, by reason of the accomplishment of the condition. We also say, that if a thing be pledged to two persons by two others separately, neither of whom were the owners thereof ; if the last pledgee happen to be in possession of the things, he will have a better right thereto than the first. But if a thing belonging to another person should be pledged by any one who has no right to do it, and it should be afterwards pledged by the owner, then he who received it of the latter, will have a better right to it than the first pledgee, whether he received it first or last. (1)

(1) *R. l. 2, tit. 16, b. 5.*

LAW 33.

Of the preference which the king has on the estate of his debtor, and that which the wife has, on account of her dowry, on the property of her husband.

The debts due to the king's chamber, (*a*) and those which the husband owes to the wife, on account of her dowry, (*b*) though posterior, enjoy such a privilege that the debt due to the king's chamber, ought first to be paid out of the effects of the debtor, in preference to all others, as also that due the wife, out of the property of her husband, unless where the anterior creditor has a special pledge upon the thing, as where the whole estate of the debtor is expressly (*por palabras*) affected in his favour: for then such creditor ought to be paid in preference to the king's chamber or the dowry of the wife. But if a man should have had two wives, both of whom are dead, then the dowry which he owed to the first wife, ought to be first paid to the children who inherit from her, and afterwards that which he had received from his second wife, as both debts are of the same nature. But if among the effects of the husband, any thing should be found which originally belonged to the second wife, it will remain entire (*en salvo*) to her or her heirs. (*c*) We

(*a*) Nota, cameram regiam idem esse quod fiscum. Gregorio Lopez.

(*b*) By the provisions of the civil code, the privilege of the wife for her dowry is reduced to a tacit mortgage. Art. 53, p. 332, 334.

(*c*) Ergo etiam procedet hæc lex, etsi res datæ fuerunt æstimate ea estimatione quæ faceret emptionem. Gregorio Lopez.

also say that where a woman marries a man, and she or another person for her, promise to give him a certain thing in dowry ; and then the husband, on account of the dowry he expects to have, pledge specially his estate, and afterwards pledge it again to any one else, before the wife or the other person for her, had paid him what they promised in dowry ; if, then, she or such other person in her name, pay the dowry, she will have a better right on the property of her husband than any other person in whose favour he had obligated it.

LAW 34.

In what case the last pledgee has a better right than the first.

The same thing may be pledged to two persons, at different times. And if the owner happen afterwards to pledge it to a third person, the obligation may be so contracted, as that the third pledgee shall have the same right to it as the first. Such would be the case, where three things have been observed in the contract. The first, that the third pledgee should take the thing, with an intention that the money he advanced thereon, should be given to the first pledgee. The second, that such third pledgee should agree with the pledgor, that he should have the same right on the thing as the first. The third, that the money should be actually and fully paid to the first pledgee. But if the second pledgee pay the money to the third, then the rights of the third pledgee, will revert to the second, though they had made no contract to that effect.

We also say that if any third person, to whom the thing was not pledged, and who has no right to it, should pay the sum the first pledgee had given upon it, under an agreement made with him, that he should transfer to him the rights he had to the thing pledged ; then the thing will remain bound in favour of such third person, in the same manner as if it had been first pledged to him by the owner.

LAW 35.

That the owner of the thing pledged, may recover it, if the pledgee give it in pledge to another person.

It may be, that a man who had received a thing in pledge, may afterwards give it in pledge to another person ; and though he may have the power to do so, yet if he be paid the sum he had given upon it, then he to whom he had pledged it, will have no right thereto, but ought on the contrary, to restore the thing to the owner. Yet the second pledgee may require that the person who pledged it to him, should give him another pledge equally good, or that he should pay him the money he had lent him thereon.

LAW 36.

If the thing pledged be lost or deteriorated, the amount of the loss or damage ought to be deducted from the debt.

When the thing pledged is deteriorated through the fault or neglect of the pledgee, if the damage be equal to the amount of the debt due him on the pledge, he

will lose his right to the thing ; if the damage be less, then the amount of the same ought to be deducted from the debt ; and if it is greater, the pledgee will lose the right to the thing pledged, and shall moreover pay to the owner, the damage he had sustained by such deterioration. And we moreover say that if the thing pledged be a female slave, and the pledgee make an improper use of her, by putting her in a brothel and prostituting her, for sake of gain, he shall lose all the right he had to the pledge. And so it would be, if he should compel the slave to do any unlawful act, contrary to the will of the master.

LAW 37.

That no one can enfranchise his slave, while he remains in pledge.

No man can enfranchise a slave whom he had given in pledge, to the prejudice of the pledgee, as long as the pledge continues. But if he enfranchise him in the presence of the pledgee, who makes no opposition, the enfranchisement will be valid ; yet the pledgee may recover what is due him from the pledgor. We likewise say that if the master enfranchise the slave without the knowledge of the pledgee, that immediately the slave or any other person for him, pay the debt, the enfranchisement will be valid. If, however, a man should obligate the whole of his estate generally, for a debt he owes, and he afterwards enfranchise a slave, the enfranchisement would be valid, if his remaining property be sufficient to pay the debt.

LAW 38.

For what causes the contract of pledge is dissolved.

The contract of pledge is dissolved as soon as the pledgor pays the debt to the pledgee. So we say it would be, if the pledgor wished to pay the debt, and the pledgee were unwilling to receive it; and the pledgor should summon the pledgee therefor (*afruenta desto*) before good men, and seal up the money in a bag and deposit it in some religious place, or in the hands of any substantial man (*ome bueno.*) We also say that where one man has pledged a thing to another, and afterwards the judge condemns the pledgor to pay or to do any thing, and in executing the judgment, the judge finds no other property belonging to the pledgor, he may then deliver to the creditor the thing given in pledge, if it be worth more than the debt due upon it, though the pledgee be unwilling that it should be done, and the thing ought to be sold at public auction and the price thereof paid to the pledgee, and the surplus, if any, delivered over to the person in whose favour the judgment was rendered. (1)

(1) C. art. 81, p. 472.

LAW 39.

How and when a man loses his right to the thing he has in pledge, if he should not claim it in the time prescribed by law.

A man sometimes pledges things to one person, without delivering them to the pledgee, and afterwards alienates them to another. We say that in such a case, if he to whom the thing was pledged, should not demand it from those who have it in possession, within ten years, if he be present in the place, or twenty, if he be absent, he cannot afterwards do it; unless the person to whom it had been given or sold, knew at the time he received it, that it was pledged to another: for then the pledgee may claim it at any time, within thirty years. We also say that if neither the pledgee to whom the thing is not delivered, as is above said, nor his heirs should claim the thing of the pledgor or his heirs, during forty years, they cannot afterwards claim it as a pledge, notwithstanding it should be in the possession of the pledgor. (1)

LAW 40.

How the right is lost which the pledgee has to the thing pledged, either by express agreement or by operation of law.

The pledgee may lose his right to the thing pledged, either openly by express words or tacitly: expressly,

(1) C. art. 31, p. 472.

when he declares to the pledgor or to his attorney, that he returns the pledge or that he abandons the right he has to the same. And notwithstanding he so declares that he abandons his right, it is nevertheless not understood that he relinquishes the debt due him thereupon; unless he should expressly say that he relinquishes both the debt and his claim to the pledge. But if he release the principal debt, it is understood that he releases the pledge also. And the pledgee may tacitly release his right to the thing pledged; as where the contract is executed in writing, and he being in possession of the instrument, cancel or tear it up, or deliver it to the pledgor: for by so delivering or cancelling it, it is understood that he relinquishes his right both to the debt and pledge; unless he had acted through any fear, force or fraud which had been practised upon him.

LAW 41.

How and when the pledgee may sell the thing pledged, in case there should be an agreement to that effect.

The pledgor and pledgee sometimes agree, when they enter into the contract, that the thing should be sold, if the pledgor should not redeem it, at the time fixed on, or by a certain day. We therefore say that if such stipulation be entered into, when the contract was made, and the pledgor should not redeem it at the time designated, then the pledgee or his heirs may sell it, in the manner stipulated in the agreement. But before he sells it, he should give notice of his intention to do so, to the pledgee, if he be in the place, and if he

be not, then he should inform those whom he finds in his house : And after having given such information, or having been prevented therefrom by some just cause, he may then sell the thing pledged ; provided he do it, at public auction, in good faith and without fraud. And if it produce more than the sum due on the pledge, the pledgee ought to pay the surplus to the pledgor. And if it produce less, the pledgor will be bound to pay the balance of the debt. (1)

LAW 42.

How and when the thing pledged may be sold, although no agreement had been made in that respect, at the time of the contract.

A man sometimes pledges a thing purely and simply, without fixing a day at which it should be redeemed, or agreeing that it should be sold. We therefore say that when the contract is made in this way, and the pledgee summon (*ajrentare*) the pledgor, before good men, to redeem the pledge ; if the latter refuse to do it accordingly, the pledgee may sell it, after the lapse of twelve days, if the thing be moveable, and thirty days, if it be immoveable. We moreover say that if it had been stipulated at the time of the contract, that the pledgee should not sell the thing at all ; nevertheless the pledgee may summon the pledgor three times, before good men, to redeem it, and if he should not accordingly do it, within the space of two years thereafter, the pledgee may then sell it. And

(1) C. art. 81, §. 472.

the sale, in whatever manner it may take place, ought to be made in good faith and at public auction, as is said in the preceding law. We also say that the sale of the things delivered or given in pledge to the creditors, by order of the judge, should be made at the periods of time and in the manner prescribed in the laws contained in the title of the third Partida (a) which treats of the execution of judgments. (1)

LAW 43.

For what reason the pledgee or his heirs may sell the thing pledged, notwithstanding they had been paid a part of the debt.

When a man receives several things in pledge for the same debt, he may, if he please, sell the whole or a part of them in either of the ways mentioned in the preceding law. And he may not only sell them for the whole of the debt, but for any part thereof, that may be due him. And if the pledgee happen to die before the debt be paid, his heirs may exercise the same rights as he could have exercised himself in that respect. And we likewise say that the property in the pledge that is sold in the manner above prescribed, passes to the purchaser as fully as if it had been sold to him by the owner himself. But it is understood that the property is transferred to the purchaser only

(1) R. l. 21, tit. 3, b. 6.

(a) See law 6, tit. 27 of the 3d partida.

from the time the thing passed under his power, and he has paid the price of it.

LAW 44.

That neither the pledgee, nor any other person for him, can buy the thing pledged.

The pledgee, if he wish to sell the thing pledged, cannot buy it himself, unless he do it with the consent of the owner; otherwise the sale will not be valid; for whenever the pledgor pays the debt, the pledgee will be bound to abandon him the thing. But if he should offer it for sale at public auction, and could not sell it, either through want of bidders, or because those disposed to buy, should decline through fear or by the solicitations of the owner, he may require the judge of the place to adjudicate it to him, (*que le otorgue aquella cosa por suya,*) and the judge ought to do it accordingly, having regard to the amount of the debt and the value of the thing; and if he find that it is worth more than the debt, he may, at his discretion, order the pledgee to pay the overplus to the pledgor. But if he find that it is not worth so much, he ought to decree that the creditor shall preserve his right of action against the pledgor for the balance of the debt.

LAW 45.

When both pledge and security are given for a debt, what ought to be observed, if such pledge be sold.

When a man gives both pledge and security to another, for a thing which he is bound to do or to give, and he afterwards pledges the same thing to another person, before he had delivered it to the first pledgee; if the first pledgee sue the security for the debt and recover it, and the security then claim the thing of the person in possession of it; although the judge should order it to be delivered to him, on account of the debt he had paid, nevertheless whenever the owner shall reimburse him therefor, he will be bound to give up the thing; and we say the second security ought to do the same, if the second pledgee claim the thing and pay him the price he had given for it, to the first pledgee, for then he ought to deliver it up.

LAW 46.

When a thing is separately pledged to two persons, the last pledgee may obtain it by paying the first, the sum due him thereon.

Where a man pledges the same thing to two persons separately and at different times, and he afterwards give it to the first pledgee, in payment of what he owes upon it; nevertheless if then the second pledgee should pay to the first, what was due him on the pledge, the latter will be bound to deliver him the thing. We moreover say that if the second pledgee

happen to buy the thing of the first, who had the power to sell it, such sale may be rescinded whenever the pledgor shall pay to the second pledgee, what was due him on the pledge, as well as the sum which he had given to the first pledgee, when he bought it; and then such second pledgee will be bound to return to the pledgor, the thing he thus purchased when he was his debtor. But all the fruits which he reaped from the thing, after he bought it, ought to belong entirely to him, for it is but just that he should profit by the purchase he had made of the same.

LAW 47.

That the sale of a thing given in pledge by a minor under twenty-five years of age, may be rescinded.

When a minor under twenty-five years of age, pledges any thing belonging to him, under condition that if he should not redeem it by a certain day, it might be sold: we say that if it be afterwards accordingly sold, the sale may be rescinded, if the minor prove that it was made to his prejudice. But he will be bound to pay the purchaser, the amount for which he had pledged the thing. And so we say it would be where a thing is sold that had been pledged by a person of full age, but who was not in the place at the time of the sale, either because he was absent in the service of the king, or were taken captive, or were at the public school to be instructed in any science, or for any other like cause; for if he who is absent for any of these causes, return to the place and pay the debt for which the thing was pledged, he may recover it from

the purchaser, whoever he may be. But if he should neglect to demand it, during four years after his return to the place, he cannot afterwards claim and recover it. (1)

LAW 48.

That a sale made contrary to law, may be rescinded.

When he who holds the thing in pledge, wishes to sell it and has the right to do so, according to what is said in the preceding laws, the pledgor cannot prevent the sale; unless he immediately pay the debt, or accomplish, without delay, the agreement under which he pledged it. We likewise say that if the pledgee sell the thing, without having the power to do so, or if he should have such power and should do it, without observing the formalities prescribed in the laws of this title, which speak of the manner in which pledges are to be sold; in that case, the owner of the thing, may claim and recover it of any person who had so bought it, on paying him the price he had given for it, to the amount for which he had pledged it, if it had been sold for so much. And if it had been sold for less, then he ought to pay him, as much as he had given for it, and retain the surplus for the person to whom he pledged it. But if the pledgee should sell it for a greater sum than that for which it was pledged, then he and not the owner of the thing, will be bound to return the overplus to the purchaser. But if the pur-

(1) *R. ll. 1 & 2, tit. 11, b. 5.*

chaser should have acquired the thing by prescription, then he will remain proprietor thereof, and the seller will be bound to pay the pledgor, for all the loss and damage he may have sustained on account of the sale having been made contrary to law.

A W 49.

That the sale of the thing pledged, fraudulently made, may be annulled.

If a man fraudulently sell a thing which he holds in pledge, for less than its value, and the owner can prove the fraud, he may then recover of the pledgee, (although he had given him the power to sell the thing,) the amount of all the loss and damage he had sustained on account of the sale. And if the seller should be so poor that he could not pay such damages, and the buyer knew of the fraud, then the pledgor may require the latter to return the thing he had so bought, with all the fruits he had derived from it, in as much as he had acted in bad faith : nevertheless, the pledgor will be bound to return to the purchaser of the thing, the price he had paid for it, as is prescribed in the next preceding law. And if he purchased it for less than its value and should be willing to atone for the fraud, by paying over and above the price he had given, as much more as it may be found to be worth, he shall not be permitted to do so, unless the pledgor should consent thereto ; but if the purchaser were ignorant of the fraud, and had bought the thing in good faith, then he shall not be prejudiced by the fraud or

bad faith of the pledgee, nor will the pledgor have any claim against him on that account, in as much as the pledgee had the right to sell the thing: yet the pledgee who had fraudulently sold it, will be bound to repair the loss and damage which the pledgor has sustained thereby, as is above said. (1)

LAW 50.

Whether or not the pledgee is bound in warranty to the purchaser, for the thing sold.

Where a thing is given in pledge, under the condition that the pledgee may sell it, and he accordingly do it, not as his own property, but as a pledge, and the purchaser be afterwards evicted, by a judgment of court, then the pledgor, and not the seller, will be bound to guarantee (*fazer sana*) the purchaser. But if the seller had bound himself in warranty for the thing, or had received it in pledge and sold it, when he knew that it belonged to another person and not to the pledgor, or if he had sold it as his own, and not as a thing pledged; in each of these cases, he will be bound to guarantee the purchaser.

(1) *R. ll. 1 & 2, tit. 11, b. 5.*

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
Payment, Compensation, &c.

Digest lib. 46. tit. 3. - - - *De solutionibus et libera-*
tionibus.

Code lib. 8. tit. 43. - - - *De solutionibus et libera-*
tionibus.

Novels Col. 1. tit. 4. chap. 3. (a) *De solutionibus, &c.*

Domat's Civil Law, part 1. b. 4. tit. 1.

Leyes del Estilo ll. 159. 193. 199.

Civil Code, b. 3. tit. 3. chap. 5.

OF PAYMENTS, &c.

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(a) For the other modes of extinguishing debts, see Digest, b. 12, tit. 6. *ibid.* b. 42, tit. 3. *ibid.* b. 46, tit. 2 & tit. 4.—*ibid.* b. 16, tit. 2. and Code, b. 4, tit. 5. *ibid.* b. 7, tit. 71.—*ibid.* b. 8, tit. 43 & 44. *ibid.* b. 4, tit. 31.

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TITLE XIV.

Of the payment of debts, and of their extinction by what is called compensation ; and of debts paid to those to whom they were not due.

LAW 1.

Of payment and release (quitamiento) and in what respect they are advantageous.

By payment (*paga*) is meant the satisfaction (*pagamiento*) of a debt due to any one entitled to receive it, either by paying the same, or by doing that which the obligor was bound to perform : and a release (*quitamiento*) is where they who have the requisite power to do so, agree with the debtor never to demand of him what he owes, and acquit and discharge him of the same. And it is very advantageous to the debtor ; for when he has paid the debt, or is released from it, he, his securities and heirs, as also the pledges he had given, are discharged from the obligation they had contracted, to give or to do any thing.

LAW 2.

How many kinds of payments and releases there are.

There are as many kinds of payment as there are of debts for which one man may obligate himself towards another : for as the ancient sages say, when a man pays what he owes, he is free from the obligation

in which he was bound, to give or to do any thing. And a man may be discharged from a debt, either by being released from it, or by renewing the contract, or by putting another person in his place, who will comply with the agreement, or pay the debt; or by compensation, which means paying one debt with another; or by the death of the thing which was to have been given, and by many other ways which we shall mention in the laws of this title. (1)

LAW 3.

How payment or release is to be made; to whom, and of what things.

Payment of debts, ought to be made to those who have a right to receive them, and with the things that had been stipulated in the contract at the time it was made, and no other, unless he to whom it is made, should consent thereto. But if it happen that the debtor cannot pay the things he had promised, then he may give others in their stead, at the discretion of the judge. We likewise say, that if a man should not be able to do a thing, accordingly as he had stipulated, he ought to fulfil his agreement in some other manner; as shall seem meet to the judge of the place; and moreover to pay for all the loss and damage which arise from his having failed to perform what he had promised. And not only may a man be acquitted of what he owes by paying it himself, but also by the payment which

(1) C. art. 34, p. 246.

another person makes in his name. And notwithstanding the debtor should be ignorant that another had paid the debt for him, nevertheless he will be discharged therefrom, and so it would even be, if he had known it, and made opposition thereto. (1)

LAW 4.

In what manner payment ought to be made to a minor under twenty five years of age, so that he who pays, may be protected from a second demand of the same debt.

Every person who has any thing to pay for a minor, ought to be informed in what way he may do it, in order that he may not have it to pay a second time. And that he may be safe in this respect, he ought to pay what he owes, either to the minor himself, or to his guardian, with the consent or under the command of the judge of the place: for if he should pay in any other way, and the minor gamble away or dissipate what he receives, or lose it in any other manner, the debtor shall not be acquitted of the debt; but, we on the contrary say, that he shall pay it again. But if he should pay with the consent of the judge, as is above said, then, notwithstanding the minor might lose the money, yet the debtor would not be bound to pay a second time, but would be entirely acquitted of the debt. And we say that the same things ought to be observed in making payments to madmen and idiots over whom guardians had been appointed.

(1) *R. l. 2, tit. 16, b. 5.—C. art. 136, 139, & 143, p. 286, 288.*

LAW 5.

That a man is discharged from a debt by paying it to the creditor, or his mandatary.

Where a man owes a debt, and he pay it to a third person by order of the creditor, or without his order, and the creditor ratify the payment; the debtor will be as fully discharged from the debt, as if he had paid it to the creditor himself. And so we say it would be if he should pay it to the steward of the creditor, or to his attorney especially appointed to receive it, or to collect and administer all his effects. We likewise say, that if one man lend money to another, and receive a promise from him to this effect: "do you promise me to return the money I lend you, either to me, or such a one," mentioning him by name; if the debtor pay the money to the person designated, he will be as fully discharged from the debt, as if he had paid the creditor himself, notwithstanding he had been forbidden by the latter to pay it, after the promise was made. But this must be understood, where the payment is forbidden, before he who had lent the money had brought suit to recover the same: for if the debtor be forbidden, after suit is instituted, from paying the money to the person indicated, and he pay it notwithstanding, he will not be thereby acquitted of the debt, but will, on the contrary, be bound to pay it again to the person to whom he had made the promise. But a man who has twice paid a debt in this way, will preserve his right to claim back the money of him to whom he had first paid it, as of a person who had no

right to retain it. We likewise say, that if the person empowered by the obligation to receive the payment, should change his condition, after the promise was entered into, then the obligor ought not to pay him the debt. As where he were then free, and should afterwards, for some cause, become a slave; or if he were a lay person, and afterwards joined a religious order; or if he were afterwards banished for ever to any particular place; or where he, in any other manner, should lose the power he had over himself, and come under that of another. We moreover say, that if the creditor himself should be afterwards accused of any crime for which he is exposed to the loss of life or his whole estate, then the debtor ought not to pay him, before he is acquitted of the charge. But if he were accused of any other offence than of the nature above mentioned, the debtor could not withhold the debt on that account, but should, on the contrary, pay it, and he would be thereby acquitted and discharged. (1)

LAW 6.

How the payment of a debt ought to be made to a third person who had the power from the creditor to receive it, if afterwards the creditor forbid the payment of it.

When a man orders his debtor to pay what he owes him to a third person whom he expressly mentions, and he afterwards forbid him to do it; if the debtor pay it notwithstanding the prohibition, he will not be discharged from the debt. But if he happen to pay

(1) *R. l. 2, tit. 16, b. 5.—C. art. 139, p. 288.*

after he is ordered to do so, and then the owner believing that he had not paid it, should forbid him to do it, the debtor would be nevertheless acquitted of the debt: and so we say it would be, if the creditor, after he had ordered him to pay the debt, should send to request him, either by letter or by his mandatary, not to do it: for if neither the letter nor the order should be delivered, and the debtor should pay, not knowing that the creditor had forbidden the payment, then the debtor will be as fully discharged from the debt, as if he had paid it to the creditor himself.

LAW 7.

Whether or not the debt ought to be paid to the attorney who sues for it in behalf of another person.

Where one man constitutes another his attorney (*personero*) in order to bring suit for a debt due him; although such attorney should gain the cause, yet the debt is not to be paid to him, unless the constituent had granted him power, in his letter of attorney, to receive payment, as well as to sue for it: and if such power be not contained in the letter of attorney, the debtor ought to pay the debt to the creditor, and not to the attorney. We likewise say that such attorney cannot stipulate with the debtor (*fazer pleyto de quitamiento*) not to require the debt of him or to give him a discharge: but if full and entire power had been given him in the letter of attorney, to demand and recover the debt, and do all other things that the creditor himself could do, if he were present; he might then

receive payment, and acquit the debt as fully as the person who had constituted him his attorney. (1)

LAW 8.

How the debtor is to make payment when the creditor is unwilling to receive it.

Men sometimes agree among themselves upon certain times or days at which they promise to give to, or do certain things, for one another. Wherefore we say that every person is bound to give or to do what he had promised at the time fixed upon for that purpose, and he cannot excuse himself therefrom, notwithstanding the other should not require him to do it. We also say that if the debtor should wish to pay the debt to the creditor, who is unwilling to receive it, he ought to summon him (*fazer afrenta*) before good men, at a proper place and time, exhibiting to him the money with which he intends to make the payment: and he ought, moreover, to put it in deposit, with some good man or in the vestry of the church: from that time he will be acquitted of the debt, and the creditor will have no further claim against him. We moreover say that if the money should be lost, without the debtor's fault, after it had been deposited in the manner above mentioned, the loss will be on account of the creditor alone, since he was in fault in not receiving it, when the other was willing to pay him. (2)

(1) *C. art. 8 & 9, p. 422.*

(2) *C. from art. 157 to 165, inclusively, p. 292 & 294*

LAW 9.

That the debtor is acquitted of the debt, by the death of the specific thing concerning which the obligation was contracted.

When any one is bound to give another an animal, or any other specific thing, and the thing be lost or the animal die, without the fault or fraud of the debtor, before the time arrive at which it was to have been given, or before the other demand it judicially, when no time had been agreed upon; the debtor will be discharged from the obligation. But if the thing be lost or the animal die, through any fault or fraud on his part, he will be bound to pay its estimated value. We likewise say that where one man claims a debt of another, alleging that it is due, while the other denies it, declaring that he owes nothing; if then the plaintiff voluntarily prefer the oath to the defendant, who swears that he does not owe what is claimed, he will be as fully discharged thereby, as if he had paid the debt, or had been acquitted by a sentence of court. So we say it would be, if the creditor should deliver to the debtor, the written obligation of the sum due, or should purposely tear it, with the intention of acquitting the debt; that the debtor would be as effectually discharged, as if he had paid the debt. But if the creditor can prove by good men, that he had given the writing to the debtor in deposit, and not with an intention of acquitting the debt; or that it had been stolen from him, or taken by force, or torn, without his consent, then his right will remain unimpaired against the debtor. (1)

(1) *C. art. 184 & 202, p. 300.—ibid, art. 263, p. 316.*

LAW 10.

Where one man owes another several debts, and he pay either of them, which is understood to be paid.

Where one man owes another several different debts and he pay one of them, specifying which, the payment ought to be imputed to the one specified, and to no other. But if he happen not to specify any, and the person receiving payment immediately specify one of the principal debts, for which he received it, the other being silent in that respect; then the payment ought to be accordingly imputed to the debt specified by the creditor, and to no other. But if the debtor immediately oppose the imputation, and before he quits the place; then whatever he pays, ought to be imputed to the debt which he designates. And if neither of them should specify the debt to which the payment was to be imputed; in that case, if the debts be equal, neither of them being incumbered with any penalty, interest, or in any other way, more than the others; the payment ought to be divided among all the principal debts recognized by the debtor, and concerning which there exists no dispute. If, however, one of the debts should be more onerous than the rest, on account of some penalty annexed to it, or for any other similar cause, then the payment ought to be imputed to such debt alone. (1)

(1) C. from art. 153 to 156 inclusively, p. 290.

LAW 11.

Who ought to be first paid, out of the estate of the debtor, when the sums claimed are of the same nature, and not secured by pledge.

Men sometimes contract debts towards one another, without obligating the whole or a part of their estates, but simply recognizing them in writing, before witnesses, or in court. This is what is called in Latin, *debitum personale*; which means a debt for which the person only of the debtor is bound, and not the whole nor any part of his estate. And therefore we say, that if a man owe several debts of this nature, he who first institutes suit for his claim and obtains judgment thereon against the debtor, ought to be paid before all the other creditors, notwithstanding his claim was posterior in point of time, and the others will have no right to demand any thing of him in this respect. But if all or a part of the other creditors bring suit likewise, for their claim, and judgment be rendered against the debtor at the same time in favour of all, or a part only of them; if then the estate of the debtor be not sufficient to pay the whole of the debts, it ought to be divided among those in whose favour judgment was rendered, giving to each of them, more or less, according to the sum due him. But if any thing belonging to a third person, should be found among the effects of the debtor, and which had been given to him to keep, it ought to be restored to the owner, and the other creditors cannot prevent it. (1)

(1) C. art. 9 & 14, p. 454 — *ibid* art. 78, p. 470.

LAW 12.

How payment for things given in deposit ought to be made.

Debts due upon things given in deposit, enjoy great advantages ; for although the depositary should owe other debts, yet when the thing given in deposit, is demanded of him, he ought to deliver it up, before he pays any other debt he owes : as where the depositor brings suit against him for it, at the same time he is sued for other debts for which his property is not affected, and which are not of the nature of a deposit : for then the judge ought to compel the depositary to pay over that which was given him in deposit, before he paid any other debt whatever, although of an anterior date. (a)

LAW 13.

In what manner men ought to pay for the waste and damages which they commit upon the property of another.

Men sometimes commit waste and damages upon the estates of other persons, either by cutting down the trees or tearing up the vines, or by killing or wounding the slaves or cattle, or in some other similar way : wherefore we say, that if any one bring a suit against another, for the damage or injury he had done to any of these things, the wrongdoer will be bound to pay the person who sustained the damage, in the same manner as for any other debt. And whenever one or more persons bring suit, on account of such damage, who-

(a) See the note on the law 9, of the title on deposit, p. 640.

ever first obtains judgment against the wrongdoer (*malfechor*), ought to be first paid out of his estate, in the manner we have mentioned in the eleventh law of this title.

LAW 14.

That the creditor ought simply to claim his debt by suit, and ought not of himself to seize upon the property of the debtor.

Men ought to demand of one another, the debts due them simply, and without anger (*braveza*): Nor shall the creditor whatever may be his power or riches, of his own authority and without the command of the judge of the place, compel his debtor and seize upon his property, and cause him to pay; unless at the time the debt was contracted, the debtor had granted him power to that effect. And if any one violate this law, and of his own authority, exercise compulsion upon his debtor, without having the right to do so, as is above said, and thereby compel him to pay the debt, he shall return what he receives, and lose all the rights he had against the debtor by reason of the debt. But if he should not receive payment of the debtor, and should seize upon his property by force, he shall restore the double of what he had seized, and until he shall do it, the debtor will not be bound to answer to any suit he may institute for the recovery of the debt.

LAW 15.

That the principal obligation may be extinguished by making another de novo.

Novation (*renovamiento*) is another mode of discharging a debt, and which extinguishes the principal

obligation as effectually as if the debt were paid : such would be the case, where one man buys a thing of another, and the buyer afterwards renew the contract with the seller, obligating himself to pay the price, as for a loan : for then the debtor would not be bound to pay the debt, on account of the sale, but the price thereof, as for money taken on a loan. We also say that the original contract may be novated, in another way ; as where the debtor renews it, by giving another debtor to pay in his place, with the consent of the creditor, by openly declaring that he does it, with the intention that the first obligation should be annulled, and that the person put in his stead, should be bound for the debt and himself discharged ; then the second contract will be valid, and the first annulled, so that if the second debtor should become so poor that he could not pay the debt, nevertheless the creditor would have no claim on that account against the first debtor. Yet if the debtor had not made use of the above expressions, at the time he renewed the obligation ; but had simply said that he delegated such a one, to pay the debt ; such renewal would not annul the first obligation, but would, on the contrary, confirm it, and both debtors would be bound for the debt : nevertheless, the payment thereof made by one of them, would discharge the other. We also say, that if the renewal of the obligation, which we mentioned in the beginning of this law, be made conditionally, and the condition be afterwards accomplished ; then the first obligation would be annulled and the second will remain valid, and he who had undertaken to perform such second obligation, will be bound to pay the

debt, while the other debtor would be acquitted. But if the condition should not be accomplished, then the first contract will remain valid, and the person contracting it would be bound for its performance; whereas the renewal thereof by the second agreement, would be of no effect. And so we say it would be, if the circumstances of the debtor who had renewed the obligation, should so change, before or at the time of the happening of the condition, that he no longer had the power to appear in court; for then, notwithstanding the condition might be accomplished, the second obligation would not be valid, while the first would have its effect. (1)

LAW 16.

That debts contracted simply, may be validly renewed under condition.

A man may obligate himself conditionally to pay a debt or to do a thing: and it may afterwards happen that another person renew the same contract, by obligating himself purely and unconditionally to pay the debt for him. In this case, we say that the second obligation will not be valid, unless the condition of the first should be accomplished; for in as much as the contract was renewed for the same debt, it cannot subsist, except under the same condition that was annexed to the first; unless at the time of its renewal, the obligor had openly declared that he obligated him-

(1) *R. l. 2, tit. 16, b. 5.—C. from art. 173 to art. 182, inclusively, p. 296.*

self to pay the debt, notwithstanding the condition annexed to the first contract should not be accomplished: then, whether the condition happen or not, the second obligation will be valid, and he who contracted it, will be bound to pay the debt, while the first agreement will remain void. (1)

LAW 17.

That a slave cannot obligate himself to pay the debt owed by a free man.

We likewise say that if a woman renew a contract, obligating herself to pay the debt which any man owed, she may nevertheless revoke such obligation; but the first contract will not be thereby destroyed: and the reason is, that this would be a sort of suretyship by which a woman cannot obligate herself. (2)

[No other part of this law in force.]

LAW 18.

That if a minor take upon himself to pay the debt which any other person owed, by renewing the obligation, the debt cannot be afterwards claimed, either of the minor or of such person.

If a minor above seven and under fourteen years of age, renew any contract by which he obligates himself to pay the debt of another person, without the consent of his guardian; the first obligation will be annulled by the renewal; and he who had contracted

(1) *R. l. 2, tit. 16, b. 5*

(2) *R. l. 7. tit. 3, b. 5.*

it, will be discharged therefrom ; so that he will no longer be bound to pay the debt, nor will the minor, unless he choose to do so, as the creditor will be to blame for novating the obligation with the minor who had not the power to contract it to his prejudice. (1)

LAW 19.

That if any one, believing himself to be the debtor of another, when in truth he was not, should agree to pay the debt to a third person, whether he would be bound to pay it accordingly.

If a man, believing himself to be the debtor of any person, should, on that account promise to pay him what a third person owed him, by renewing the contract and obligating himself therefor ; then the first obligation would be extinguished, and the second would be valid, and he who contracted it, would be bound to pay the debt, notwithstanding he should afterwards discover that he owed nothing to the person to whom he believed he was indebted, yet he would have the right, before he paid the debt, to demand of such person to whom he believed he was indebted, to relieve him against the obligation into which he had entered ; and if he refuse to do it, and the obligor should be compelled to pay the debt, out of his own effects, then the third person in whose name he had promised to pay it, would, at any rate, be bound to reimburse him, and he could not excuse himself, by alleging that he had not ordered the other to pay for

(1) C. art. 174, p. 296.

him, in as much as this other had paid in his name, what he owed, believing he was bound to do so. But if a debtor, under the belief that his creditor was indebted to a third person, should renew the contract with such third person, obligating himself to pay what he supposed his creditor owed; he may nevertheless, before he satisfy the debt, declare that he would not pay it, in as much as his creditor owed nothing to the obligee. If, however, the obligor should, by the command of his creditor, pay such third person, the sum in which he had obligated himself, he will be discharged from the debt: yet his creditor will retain the right to claim back what had been so paid, in as much as it was not due to the person who received it, and who will therefore be obliged to restore it. But if the obligor should pay, without the order of his creditor, he will not be thereby acquitted of the debt he owed him, but will, on the contrary, be bound to pay it: yet he may require of the person to whom he had paid, to restore what he had received, and he would be accordingly bound to do so. (1)

LAW 20.

That one debt may be extinguished by another by way of compensation.

Compensation is another way in which a debt due from one man to another, may be extinguished. And *compensatio* in Latin, means in common speech, the payment of one debt by another: as where one man

(1) *R. l. 2, tit. 16, b. 5.*

sues another, for a thousand maravadis, and the defendant reply that he wishes to prove, that the plaintiff is indebted to him in a like sum, and therefore prays the judge that one debt may be acquitted by the other: for if the judge find such to be the fact, he shall accordingly order the two debts to be compensated the one by the other, and the parties will be bound to comply with the judgment. But before he orders the compensation to take place, he should examine whether the party who prays for it, can immediately prove and verify what he alleges, or at the latest, within ten days: and if he can do it in that time, or if the other acknowledge the debt, then the judge ought to decree as is above said. But if he conceive that the party cannot so soon produce his proof, on account of the great distance at which his witnesses or papers are; he ought not, in that case, to order the compensation to take place, but should proceed in the cause, as the law requires. (1)

LAW 21.

What are the debts that cannot be compensated by each other.

All debts of things that can be counted, weighed, or measured, may be compensated by each other to the amount due from the respective debtors. We likewise say that if two men mutually owe one another, things that are uncertain and not specified; such as a horse, or other similar things not designated by name or certain marks; then one of the debts may be com-

(1) *R. l. 2, tit. 16, b. 5.—C. art. 189, 190, 191, p. 298.*

pensated by the other. But if one of them should be for a specific thing, as a slave, vineyard, garden or other thing certain; while the other was not for a thing specified by name, as a quantity of wheat, or any thing else that can be counted, weighed or measured, then the debtors cannot be compelled to acquit one debt by the other. (1)

LAW 22.

That partners may compensate among themselves, the loss and damage which the partnership sustains through their fault.

Where two or more men are in partnership, and one of them demand amends of the other, for the damage he had done to their common property, by his neglect or fault, and this other reply that the plaintiff also had done as much damage to the partnership, in a similar way; then the losses on both sides, may be mutually compensated, if they be respectively equal; and if not, then to the amount of the injury done by each of the partners. And so we say it would be, where one of the partners had, on one hand, caused a loss to the partnership and on the other had benefited it: for then the benefit and loss ought to be compensated the one with the other, to their respective amounts. So likewise it would be where one of the partners should take something, out of the partnership stock, for his own use, and the other should claim his part thereof; if the partner who had taken it, allege that he is not bound to restore any part of it, in as much as he would prove

(1) C. art. 191, p. 298.

that the other had done damage to the partnership effects equal in amount, to what he had so taken, and he accordingly prove it, the one ought to be compensated by the other.

LAW 23.

How the damage which one of the partners fraudulently causes to the partnership stock, ought to be compensated.

If one of the partners commit any fraud upon the partnership, by which it sustains loss or damage, and the other demand amends for the same ; if he of whom the demand is made, reply that he wished to prove that this other had likewise, through his fraud, caused loss or damage to the partnership to an equal amount : on such proof being made, we say that the respective losses may be balanced against each other. And we also say, that if any thing belonging to the partnership should be lost or deteriorated by the neglect or fault of one partner, and something else of equal value should be lost or deteriorated by the fraud of the other ; then one loss may be compensated by the other. But if any thing be lost or deteriorated by the fault only of one of the partners, and by the fraud of the other ; then the fraud cannot be compensated by the fault, but on the contrary, he who had been guilty of the fraud, will be bound to pay all the damage and loss arising therefrom, nor can he claim any thing of the other, on account of the fault he had committed ; for in the scales of justice, the fraud of one outweighs the fault of the other, when they both relate to the same thing. And what we have said in the two preceding laws, relative

to partners, applies equally to all contracts entered into between men, concerning things which they own, in any other way, in common.

LAW 24.

That securities and attorneys in fact, may plead compensation for their principals, when suit is brought against them.

Not only may the principal debtor compensate one debt by another, but his security may likewise compensate either a debt due his principal or one that is due to himself. And so we say the attorney in fact of the principal debtor or of his security, may compensate a debt due either of them, by giving security that he whose attorney he is, shall ratify what he does. But where the attorney owes a debt to a person of whom he makes a demand in the name of another, he cannot compensate such debt in the name of his principal, without the consent of the latter. (1)

LAW 25.

That the son may compensate the debt for which the father is sued.

When a man is sued for a debt which he owes, and cannot appear and answer at the time fixed; if then one of his sons appear and answer for him, and declare to the judge that the plaintiff owes a sum to his father equal to that for which he brought suit, and prays the judge to compensate one debt by the other: such com-

(1) C. art. 194, p. 298.

pensation ought not to be allowed, unless the son will give security that his father shall ratify what he does : for on giving such security and on proving the debt which he alleges the plaintiff owes to his father, or if the plaintiff acknowledge it, the judge may order that one debt be acquitted by the other. And we also say that the same rule ought to be observed in all suits wherein one person undertakes the defence of another, though he were neither his son nor relation, nor have any letter of attorney to that effect.

LAW 26.

Why a man cannot compensate a debt which he owes to the king or a corporation.

We said in the preceding laws, that all debts of things that can be counted, weighed or measured, may be compensated : but there are cases in which it is not so. As where the king or a corporation possesses funds especially destined to make or repair the walls, fountains or bridges of the place ; or to construct machines of war, or gallies ; or to buy arms or provisions for the army, or rations for persons in the service of the king or corporation, or for other similar things : for whenever any one is bound to pay money destined for these purposes, or as a tax or quit rent to the king's chamber, or to a corporation, he cannot compensate the same by a debt due to him from the king or corporation. And so we say it would be with respect to the tolls which are to be paid on the transportation of goods from one place to another. So we also say, that if a man institute any person for his heir, under con-

right to retain it. We likewise say, that if the person empowered by the obligation to receive the payment, should change his condition, after the promise was entered into, then the obligor ought not to pay him the debt. As where he were then free, and should afterwards, for some cause, become a slave; or if he were a lay person, and afterwards joined a religious order; or if he were afterwards banished for ever to any particular place; or where he, in any other manner, should lose the power he had over himself, and come under that of another. We moreover say, that if the creditor himself should be afterwards accused of any crime for which he is exposed to the loss of life or his whole estate, then the debtor ought not to pay him, before he is acquitted of the charge. But if he were accused of any other offence than of the nature above mentioned, the debtor could not withhold the debt on that account, but should, on the contrary, pay it, and he would be thereby acquitted and discharged. (1)

LAW 6.

How the payment of a debt ought to be made to a third person who had the power from the creditor to receive it, if afterwards the creditor forbid the payment of it.

When a man orders his debtor to pay what he owes him to a third person whom he expressly mentions, and he afterwards forbid him to do it; if the debtor pay it notwithstanding the prohibition, he will not be discharged from the debt. But if he happen to pay

(1) *R. l. 2, tit. 16, b. 5.—C. art. 139, p. 288.*

after he is ordered to do so, and then the owner believing that he had not paid it, should forbid him to do it, the debtor would be nevertheless acquitted of the debt: and so we say it would be, if the creditor, after he had ordered him to pay the debt, should send to request him, either by letter or by his mandatary, not to do it: for if neither the letter nor the order should be delivered, and the debtor should pay, not knowing that the creditor had forbidden the payment, then the debtor will be as fully discharged from the debt, as if he had paid it to the creditor himself.

LAW 7.

Whether or not the debt ought to be paid to the attorney who sues for it in behalf of another person.

Where one man constitutes another his attorney (*personero*) in order to bring suit for a debt due him; although such attorney should gain the cause, yet the debt is not to be paid to him, unless the constituent had granted him power, in his letter of attorney, to receive payment, as well as to sue for it: and if such power be not contained in the letter of attorney, the debtor ought to pay the debt to the creditor, and not to the attorney. We likewise say that such attorney cannot stipulate with the debtor (*fazer pleyto de quitamiento*) not to require the debt of him or to give him a discharge: but if full and entire power had been given him in the letter of attorney, to demand and recover the debt, and do all other things that the creditor himself could do, if he were present; he might then

receive payment, and acquit the debt as fully as the person who had constituted him his attorney. (1)

LAW 8.

How the debtor is to make payment when the creditor is unwilling to receive it.

Men sometimes agree among themselves upon certain times or days at which they promise to give to, or do certain things, for one another. Wherefore we say that every person is bound to give or to do what he had promised at the time fixed upon for that purpose, and he cannot excuse himself therefrom, notwithstanding the other should not require him to do it. We also say that if the debtor should wish to pay the debt to the creditor, who is unwilling to receive it, he ought to summon him (*fazer afrenta*) before good men, at a proper place and time, exhibiting to him the money with which he intends to make the payment: and he ought, moreover, to put it in deposit, with some good man or in the vestry of the church: from that time he will be acquitted of the debt, and the creditor will have no further claim against him. We moreover say that if the money should be lost, without the debtor's fault, after it had been deposited in the manner above mentioned, the loss will be on account of the creditor alone, since he was in fault in not receiving it, when the other was willing to pay him. (2)

(1) *C. art. 8 & 9, p. 422.*

(2) *C. from art. 157 to 165, inclusively, p. 292 & 294.*

LAW 9.

That the debtor is acquitted of the debt, by the death of the specific thing concerning which the obligation was contracted.

When any one is bound to give another an animal, or any other specific thing, and the thing be lost or the animal die, without the fault or fraud of the debtor, before the time arrive at which it was to have been given, or before the other demand it judicially, when no time had been agreed upon; the debtor will be discharged from the obligation. But if the thing be lost or the animal die, through any fault or fraud on his part, he will be bound to pay its estimated value. We likewise say that where one man claims a debt of another, alleging that it is due, while the other denies it, declaring that he owes nothing; if then the plaintiff voluntarily prefer the oath to the defendant, who swears that he does not owe what is claimed, he will be as fully discharged thereby, as if he had paid the debt, or had been acquitted by a sentence of court. So we say it would be, if the creditor should deliver to the debtor, the written obligation of the sum due, or should purposely tear it, with the intention of acquitting the debt; that the debtor would be as effectually discharged, as if he had paid the debt. But if the creditor can prove by good men, that he had given the writing to the debtor in deposit, and not with an intention of acquitting the debt; or that it had been stolen from him, or taken by force, or torn, without his consent, then his right will remain unimpaired against the debtor. (1)

(1) *C. art. 184 & 202, ff. 300.—ibid, art. 263, ff. 316.*

LAW 10.

Where one man owes another several debts, and he pay either of them, which is understood to be paid.

Where one man owes another several different debts and he pay one of them, specifying which, the payment ought to be imputed to the one specified, and to no other. But if he happen not to specify any, and the person receiving payment immediately specify one of the principal debts, for which he received it, the other being silent in that respect; then the payment ought to be accordingly imputed to the debt specified by the creditor, and to no other. But if the debtor immediately oppose the imputation, and before he quits the place; then whatever he pays, ought to be imputed to the debt which he designates. And if neither of them should specify the debt to which the payment was to be imputed; in that case, if the debts be equal, neither of them being incumbered with any penalty, interest, or in any other way, more than the others; the payment ought to be divided among all the principal debts recognized by the debtor, and concerning which there exists no dispute. If, however, one of the debts should be more onerous than the rest, on account of some penalty annexed to it, or for any other similar cause, then the payment ought to be imputed to such debt alone. (1)

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LAW 11.

Who ought to be first paid, out of the estate of the debtor, when the sums claimed are of the same nature, and not secured by pledge.

Men sometimes contract debts towards one another, without obligating the whole or a part of their estates, but simply recognizing them in writing, before witnesses, or in court. This is what is called in Latin, *debitum personale*; which means a debt for which the person only of the debtor is bound, and not the whole nor any part of his estate. And therefore we say, that if a man owe several debts of this nature, he who first institutes suit for his claim and obtains judgment thereon against the debtor, ought to be paid before all the other creditors, notwithstanding his claim was posterior in point of time, and the others will have no right to demand any thing of him in this respect. But if all or a part of the other creditors bring suit likewise, for their claim, and judgment be rendered against the debtor at the same time in favour of all, or a part only of them; if then the estate of the debtor be not sufficient to pay the whole of the debts, it ought to be divided among those in whose favour judgment was rendered, giving to each of them, more or less, according to the sum due him. But if any thing belonging to a third person, should be found among the effects of the debtor, and which had been given to him to keep, it ought to be restored to the owner, and the other creditors cannot prevent it. (1)

(1) C. art. 9 & 14, p. 454 — *ibid* art. 78, p. 470.

LAW 12.

How payment for things given in deposit ought to be made.

Debts due upon things given in deposit, enjoy great advantages ; for although the depositary should owe other debts, yet when the thing given in deposit, is demanded of him, he ought to deliver it up, before he pays any other debt he owes : as where the depositor brings suit against him for it, at the same time he is sued for other debts for which his property is not affected, and which are not of the nature of a deposit : for then the judge ought to compel the depositary to pay over that which was given him in deposit, before he paid any other debt whatever, although of an anterior date. (a)

LAW 13.

In what manner men ought to pay for the waste and damages which they commit upon the property of another.

Men sometimes commit waste and damages upon the estates of other persons, either by cutting down the trees or tearing up the vines, or by killing or wounding the slaves or cattle, or in some other similar way : wherefore we say, that if any one bring a suit against another, for the damage or injury he had done to any of these things, the wrongdoer will be bound to pay the person who sustained the damage, in the same manner as for any other debt. And whenever one or more persons bring suit, on account of such damage, who-

(a) See the note on the law 9, of the title on deposit, p. 640.

ever first obtains judgment against the wrongdoer (*malfechor*), ought to be first paid out of his estate, in the manner we have mentioned in the eleventh law of this title.

LAW 14.

That the creditor ought simply to claim his debt by suit, and ought not of himself to seize upon the property of the debtor.

Men ought to demand of one another, the debts due them simply, and without anger (*braveza*): Nor shall the creditor whatever may be his power or riches, of his own authority and without the command of the judge of the place, compel his debtor and seize upon his property, and cause him to pay; unless at the time the debt was contracted, the debtor had granted him power to that effect. And if any one violate this law, and of his own authority, exercise compulsion upon his debtor, without having the right to do so, as is above said, and thereby compel him to pay the debt, he shall return what he receives, and lose all the rights he had against the debtor by reason of the debt. But if he should not receive payment of the debtor, and should seize upon his property by force, he shall restore the double of what he had seized, and until he shall do it, the debtor will not be bound to answer to any suit he may institute for the recovery of the debt.

LAW 15.

That the principal obligation may be extinguished by making another de novo.

Novation (*renovamiento*) is another mode of discharging a debt, and which extinguishes the principal

obligation as effectually as if the debt were paid : such would be the case, where one man buys a thing of another, and the buyer afterwards renew the contract with the seller, obligating himself to pay the price, as for a loan : for then the debtor would not be bound to pay the debt, on account of the sale, but the price thereof, as for money taken on a loan. We also say that the original contract may be novated, in another way ; as where the debtor renews it, by giving another debtor to pay in his place, with the consent of the creditor, by openly declaring that he does it, with the intention that the first obligation should be annulled, and that the person put in his stead, should be bound for the debt and himself discharged ; then the second contract will be valid, and the first annulled, so that if the second debtor should become so poor that he could not pay the debt, nevertheless the creditor would have no claim on that account against the first debtor. Yet if the debtor had not made use of the above expressions, at the time he renewed the obligation ; but had simply said that he delegated such a one, to pay the debt ; such renewal would not annul the first obligation, but would, on the contrary, confirm it, and both debtors would be bound for the debt : nevertheless, the payment thereof made by one of them, would discharge the other. We also say, that if the renewal of the obligation, which we mentioned in the beginning of this law, be made conditionally, and the condition be afterwards accomplished ; then the first obligation would be annulled and the second will remain valid, and he who had undertaken to perform such second obligation, will be bound to pay the

debt, while the other debtor would be acquitted. But if the condition should not be accomplished, then the first contract will remain valid, and the person contracting it would be bound for its performance; whereas the renewal thereof by the second agreement, would be of no effect. And so we say it would be, if the circumstances of the debtor who had renewed the obligation, should so change, before or at the time of the happening of the condition, that he no longer had the power to appear in court; for then, notwithstanding the condition might be accomplished, the second obligation would not be valid, while the first would have its effect. (1)

LAW 16.

That debts contracted simply, may be validly renewed under condition.

A man may obligate himself conditionally to pay a debt or to do a thing: and it may afterwards happen that another person renew the same contract, by obligating himself purely and unconditionally to pay the debt for him. In this case, we say that the second obligation will not be valid, unless the condition of the first should be accomplished; for in as much as the contract was renewed for the same debt, it cannot subsist, except under the same condition that was annexed to the first; unless at the time of its renewal, the obligor had openly declared that he obligated him-

(1) *R. l. 2, tit. 16, b. 5.—C. from art. 173 to art. 182, inclusively, p. 296.*

self to pay the debt, notwithstanding the condition annexed to the first contract should not be accomplished: then, whether the condition happen or not, the second obligation will be valid, and he who contracted it, will be bound to pay the debt, while the first agreement will remain void. (1)

LAW 17.

That a slave cannot obligate himself to pay the debt owed by a free man.

We likewise say that if a woman renew a contract, obligating herself to pay the debt which any man owed, she may nevertheless revoke such obligation; but the first contract will not be thereby destroyed: and the reason is, that this would be a sort of suretyship by which a woman cannot obligate herself. (2)

[No other part of this law in force.]

LAW 18.

That if a minor take upon himself to pay the debt which any other person owed, by renewing the obligation, the debt cannot be afterwards claimed, either of the minor or of such person.

If a minor above seven and under fourteen years of age, renew any contract by which he obligates himself to pay the debt of another person, without the consent of his guardian; the first obligation will be annulled by the renewal; and he who had contracted

(1) *R. l. 2, tit. 16, b. 5*

(2) *R. l. 7, tit. 3, b. 5.*

it, will be discharged therefrom ; so that he will no longer be bound to pay the debt, nor will the minor, unless he choose to do so, as the creditor will be to blame for novating the obligation with the minor who had not the power to contract it to his prejudice. (1)

LAW 19.

That if any one, believing himself to be the debtor of another, when in truth he was not, should agree to pay the debt to a third person, whether he would be bound to pay it accordingly.

If a man, believing himself to be the debtor of any person, should, on that account promise to pay him what a third person owed him, by renewing the contract and obligating himself therefor ; then the first obligation would be extinguished, and the second would be valid, and he who contracted it, would be bound to pay the debt, notwithstanding he should afterwards discover that he owed nothing to the person to whom he believed he was indebted, yet he would have the right, before he paid the debt, to demand of such person to whom he believed he was indebted, to relieve him against the obligation into which he had entered ; and if he refuse to do it, and the obligor should be compelled to pay the debt, out of his own effects, then the third person in whose name he had promised to pay it, would, at any rate, be bound to reimburse him, and he could not excuse himself, by alleging that he had not ordered the other to pay for

(1) C. art. 174, p. 296.

him, in as much as this other had paid in his name, what he owed, believing he was bound to do so. But if a debtor, under the belief that his creditor was indebted to a third person, should renew the contract with such third person, obligating himself to pay what he supposed his creditor owed; he may nevertheless, before he satisfy the debt, declare that he would not pay it, in as much as his creditor owed nothing to the obligee. If, however, the obligor should, by the command of his creditor, pay such third person, the sum in which he had obligated himself, he will be discharged from the debt: yet his creditor will retain the right to claim back what had been so paid, in as much as it was not due to the person who received it, and who will therefore be obliged to restore it. But if the obligor should pay, without the order of his creditor, he will not be thereby acquitted of the debt he owed him, but will, on the contrary, be bound to pay it: yet he may require of the person to whom he had paid, to restore what he had received, and he would be accordingly bound to do so. (1)

LAW 20.

That one debt may be extinguished by another by way of compensation.

Compensation is another way in which a debt due from one man to another, may be extinguished. And *compensatio* in Latin, means in common speech, the payment of one debt by another: as where one man

(1) *R. l. 2, tit. 16, b. 5.*

sues another, for a thousand maravadis, and the defendant reply that he wishes to prove, that the plaintiff is indebted to him in a like sum, and therefore prays the judge that one debt may be acquitted by the other: for if the judge find such to be the fact, he shall accordingly order the two debts to be compensated the one by the other, and the parties will be bound to comply with the judgment. But before he orders the compensation to take place, he should examine whether the party who prays for it, can immediately prove and verify what he alleges, or at the latest, within ten days: and if he can do it in that time, or if the other acknowledge the debt, then the judge ought to decree as is above said. But if he conceive that the party cannot so soon produce his proof, on account of the great distance at which his witnesses or papers are; he ought not, in that case, to order the compensation to take place, but should proceed in the cause, as the law requires. (1)

LAW 21.

What are the debts that cannot be compensated by each other.

All debts of things that can be counted, weighed, or measured, may be compensated by each other to the amount due from the respective debtors. We likewise say that if two men mutually owe one another, things that are uncertain and not specified; such as a horse, or other similar things not designated by name or certain marks; then one of the debts may be com-

(1) *R. l. 2, tit. 16, b. 5.—C. art. 189, 190, 191, p. 298.*

pensated by the other. But if one of them should be for a specific thing, as a slave, vineyard, garden or other thing certain; while the other was not for a thing specified by name, as a quantity of wheat, or any thing else that can be counted, weighed or measured, then the debtors cannot be compelled to acquit one debt by the other. (1)

LAW 22.

That partners may compensate among themselves, the loss and damage which the partnership sustains through their fault.

Where two or more men are in partnership, and one of them demand amends of the other, for the damage he had done to their common property, by his neglect or fault, and this other reply that the plaintiff also had done as much damage to the partnership, in a similar way; then the losses on both sides, may be mutually compensated, if they be respectively equal; and if not, then to the amount of the injury done by each of the partners. And so we say it would be, where one of the partners had, on one hand, caused a loss to the partnership and on the other had benefited it: for then the benefit and loss ought to be compensated the one with the other, to their respective amounts. So likewise it would be where one of the partners should take something, out of the partnership stock, for his own use, and the other should claim his part thereof; if the partner who had taken it, allege that he is not bound to restore any part of it, in as much as he would prove

(1) C. art. 191, p. 298.

that the other had done damage to the partnership effects equal in amount, to what he had so taken, and he accordingly prove it, the one ought to be compensated by the other.

LAW 23.

How the damage which one of the partners fraudulently causes to the partnership stock, ought to be compensated.

If one of the partners commit any fraud upon the partnership, by which it sustains loss or damage, and the other demand amends for the same ; if he of whom the demand is made, reply that he wished to prove that this other had likewise, through his fraud, caused loss or damage to the partnership to an equal amount : on such proof being made, we say that the respective losses may be balanced against each other. And we also say, that if any thing belonging to the partnership should be lost or deteriorated by the neglect or fault of one partner, and something else of equal value should be lost or deteriorated by the fraud of the other ; then one loss may be compensated by the other. But if any thing be lost or deteriorated by the fault only of one of the partners, and by the fraud of the other ; then the fraud cannot be compensated by the fault, but on the contrary, he who had been guilty of the fraud, will be bound to pay all the damage and loss arising therefrom, nor can he claim any thing of the other, on account of the fault he had committed ; for in the scales of justice, the fraud of one outweighs the fault of the other, when they both relate to the same thing. And what we have said in the two preceding laws, relative

to partners, applies equally to all contracts entered into between men, concerning things which they own, in any other way, in common.

LAW 24.

That securities and attorneys in fact, may plead compensation for their principals, when suit is brought against them.

Not only may the principal debtor compensate one debt by another, but his security may likewise compensate either a debt due his principal or one that is due to himself. And so we say the attorney in fact of the principal debtor or of his security, may compensate a debt due either of them, by giving security that he whose attorney he is, shall ratify what he does. But where the attorney owes a debt to a person of whom he makes a demand in the name of another, he cannot compensate such debt in the name of his principal, without the consent of the latter. (1)

LAW 25.

That the son may compensate the debt for which the father is sued.

When a man is sued for a debt which he owes, and cannot appear and answer at the time fixed; if then one of his sons appear and answer for him, and declare to the judge that the plaintiff owes a sum to his father equal to that for which he brought suit, and prays the judge to compensate one debt by the other: such com-

(1) C. art. 194, p. 298.

pensation ought not to be allowed, unless the son will give security that his father shall ratify what he does : for on giving such security and on proving the debt which he alleges the plaintiff owes to his father, or if the plaintiff acknowledge it, the judge may order that one debt be acquitted by the other. And we also say that the same rule ought to be observed in all suits wherein one person undertakes the defence of another, though he were neither his son nor relation, nor have any letter of attorney to that effect.

LAW 26.

Why a man cannot compensate a debt which he owes to the king or a corporation.

We said in the preceding laws, that all debts of things that can be counted, weighed or measured, may be compensated : but there are cases in which it is not so. As where the king or a corporation possesses funds especially destined to make or repair the walls, fountains or bridges of the place ; or to construct machines of war, or gallies ; or to buy arms or provisions for the army, or rations for persons in the service of the king or corporation, or for other similar things : for whenever any one is bound to pay money destined for these purposes, or as a tax or quit rent to the king's chamber, or to a corporation, he cannot compensate the same by a debt due to him from the king or corporation. And so we say it would be with respect to the tolls which are to be paid on the transportation of goods from one place to another. So we also say, that if a man institute any person for his heir, under con-

him, in as much as this other had paid in his name, what he owed, believing he was bound to do so. But if a debtor, under the belief that his creditor was indebted to a third person, should renew the contract with such third person, obligating himself to pay what he supposed his creditor owed; he may nevertheless, before he satisfy the debt, declare that he would not pay it, in as much as his creditor owed nothing to the obligee. If, however, the obligor should, by the command of his creditor, pay such third person, the sum in which he had obligated himself, he will be discharged from the debt: yet his creditor will retain the right to claim back what had been so paid, in as much as it was not due to the person who received it, and who will therefore be obliged to restore it. But if the obligor should pay, without the order of his creditor, he will not be thereby acquitted of the debt he owed him, but will, on the contrary, be bound to pay it: yet he may require of the person to whom he had paid, to restore what he had received, and he would be accordingly bound to do so. (1)

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(1) C. art. 191, p. 298.

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When a man is sued for a debt which he owes, and cannot appear and answer at the time fixed; if then one of his sons appear and answer for him, and declare to the judge that the plaintiff owes a sum to his father equal to that for which he brought suit, and prays the judge to compensate one debt by the other: such com-

(1) C. art. 194, p. 298.

pensation ought not to be allowed, unless the son will give security that his father shall ratify what he does : for on giving such security and on proving the debt which he alleges the plaintiff owes to his father, or if the plaintiff acknowledge it, the judge may order that one debt be acquitted by the other. And we also say that the same rule ought to be observed in all suits wherein one person undertakes the defence of another, though he were neither his son nor relation, nor have any letter of attorney to that effect.

LAW 26.

Why a man cannot compensate a debt which he owes to the king or a corporation.

We said in the preceding laws, that all debts of things that can be counted, weighed or measured, may be compensated : but there are cases in which it is not so. As where the king or a corporation possesses funds especially destined to make or repair the walls, fountains or bridges of the place ; or to construct machines of war, or gallies ; or to buy arms or provisions for the army, or rations for persons in the service of the king or corporation, or for other similar things : for whenever any one is bound to pay money destined for these purposes, or as a tax or quit rent to the king's chamber, or to a corporation, he cannot compensate the same by a debt due to him from the king or corporation. And so we say it would be with respect to the tolls which are to be paid on the transportation of goods from one place to another. So we also say, that if a man institute any person for his heir, under con-

dition that after his death, his estate should go to the king's chamber, or to any corporation : or if he give him a sum of money or other thing in deposit, to give to the king's chamber or corporation ; such person cannot compensate the same by a debt due to him from the king or corporation.

LAW 27.

That the sum in which a man has been condemned on account of any injury he had done by force ; or for the thing given him in deposit, cannot be compensated by another debt.

When sentence is rendered against a man, condemning him to pay a sum of money, for some wrong or violence he had done to another, and he request that the same may be compensated by a debt due him from the person injured ; the latter may not consent to the compensation, unless he choose. We moreover say, that if one man deposit any thing with another, whether it be of those things that can be counted, weighed or measured, or not ; notwithstanding the depositor may be indebted to the depositary, the latter cannot require that the debt should be compensated by the deposit ; but he must, on the contrary, restore the thing at any rate, after which he may bring suit against the depositor, for the amount that he owes.

LAW 28.

That payment made through error, may be revoked.

Men sometimes think themselves bound to give or to pay things which they do not owe : as where the at-

torney or steward pay a debt due from his principal, and the latter, ignorant of that fact, pay it a second time : or when a man owes a debt which the creditor releases by his will ; and the debtor, ignorant of the release, pay the heirs of the deceased : wherefore we say, that in these and other similar cases, where a man pay any thing, through error, it ought, on his proving the error, to be fully restored to him.

LAW 29.

When a man wishes to revoke a payment which he alleges he made through error, and the person receiving it, deny the error, which of them is bound to make the proof.

As doubts may arise which of the parties is bound to prove what he asserts, where a man bring suit for money which he alleges he had paid through error, when he did not owe it, and the defendant deny it : we therefore say, that if the defendant acknowledge the payment, but contend that it was properly made and not through error ; then the plaintiff will be bound to prove the error, and if he prove it accordingly, what he had paid, will be restored to him. But if the defendant deny the payment, and the plaintiff prove that he had made it, although he should not prove the error ; yet the defendant will be bound to restore what he had received, unless he be willing to shew immediately that the payment was well made. And the distinction here made, applies to every description of persons, except to women and minors under twenty-five years of age ; for if any of these bring suit for what they allege they had paid, through error, and the defendant ac-

knowledge the payment, it will be incumbent on him to shew that it was well made, and that he had a legal right to it, and if he should not accordingly make such proof, he will be bound to return what he had received. (1)

LAW 30.

That he who knowingly pays what he does not owe, cannot afterwards recover it back.

Where a man pays knowingly what he does not owe, we say that he cannot afterwards require the restitution of it, in as much as he is presumed to have paid it, with an intention of giving it away : unless he were a minor under twenty-five years of age ; for then he may recover it back, on account of his non-age. We also say that if a man pay a debt when he is uncertain whether he owes it or not ; if he afterwards prove that he did not owe it, he who had received it, would be bound to restore it.

LAW 31.

That if the legacies contained in an imperfect will should be paid, they cannot afterwards be recovered back.

Men sometimes bequeath legacies by imperfect wills, and although, according to the subtilty of law, the person in possession of such will, cannot be compelled to pay the legacies contained in it ; nevertheless, if either he or the heirs should pay them voluntarily,

(1) C. art. 10 & 12, p. 320.

they cannot afterwards require that they should be restored, by saying that they could have protected themselves in law, from paying them, as they were contained in a will not made as it ought to have been. We also say that although he who shall have paid the legacy should allege that, at the time he paid it, he had a right to have withheld it, and that he ought, on that account, to recover it back ; yet such a plea shall not avail him ; for it is incumbent on all the subjects of our kingdom, to understand the laws : and if any one, through ignorance of them, do any thing repugnant thereto, whereby he sustains injury, it will be ascribed to his own fault, unless it be a minor under twenty-five years of age, or a woman ; for these may well excuse themselves in such cases, by alleging their ignorance of the laws. (*No other part of this law in force.*) (1)

LAW 32.

That the payment of a debt contracted under a condition may be revoked.

When the condition annexed to a contract, is of such a nature that it is doubtful whether it will be accomplished or not : as if a man should say ; “ I promise to pay so many maravadis, if such a vessel arrive from Seville,” and he pay the money, before the happening of the condition, he may recover it back : for it may be that the condition will never be accomplished. But if the condition be of such a na-

(1) *R. l. 1, tit. 4, b. 5—ibid, l. 8, tit. 6, b. 5.*

ture that it must certainly happen : as if a man should say : “ I promise to give you so many maravadis, if I should die,” or under any other similar condition, and he pay the money, during his life, he cannot afterwards recover back what he had paid ; because it is certain that the condition will be accomplished.

LAW 33.

That a man, cannot recover back what he had paid, in virtue of a judgment.

If a man be condemned to pay a debt by a judgment of court from which he does not appeal, he will be bound to pay it, though it were not really due. And after he has paid it, so great would be the force of the judgment, that he could not claim restitution of what he had paid, although he should allege that he wished to prove, the judgment had not been properly rendered. For although it were rendered against truth, whether through the fault of the advocates who had not properly exposed their reasonings, or from the ignorance of the judge, yet when once rendered, it ought to be observed, if no appeal be taken from it : unless the party can prove that it was rendered in consequence of false allegations, witnesses or writings : for, on making such proof, he may recover back what he had paid, in virtue of the judgment. We likewise say, that if a man be sued for any thing he was bound to give or to do, and the judge acquit him of the demand : if then the defendant voluntarily pay, or do that for which he was sued, he cannot afterwards recover it back : for although a judge sometimes erro-

neously discharge a man of a claim which, according to the subtilty of law, he cannot thereafter be compelled to pay, nevertheless he will remain naturally bound for the same: if, therefore, he should pay or perform the thing for which he had been sued, he could not afterwards recover it back. But if a man who is wrongfully sued, should, from his aversion to appear before the judge, agree to give something that he might be acquitted of the demand; we say, that notwithstanding he might have had a good defence in law, nevertheless he will be bound to give what he had promised, since he did it voluntarily, and when he has once paid it, he cannot afterwards recover it back: unless he can prove that the plaintiff had brought suit against him, through malice, knowing that nothing was due; for on making such proof, he can recover back what he had so paid. (1)

LAW 34.

That a man cannot recover back, what he has remitted to his adversary, on account of the tediousness (enojo) of the cause.

A man sometimes institutes a well founded suit, and his adversary defends himself so dexterously, that the plaintiff, in order to avoid the vexation of a long protracted cause, and from the fear of losing his claim, agrees with the defendant, to remit a part of the debt, or enters into some other stipulation with him, disadvantageous to himself. Wherefore we say, that such agreements will be binding on both parties; and what-

(1) R. See the laws of the tit. 5, b. 4.

ever may be the sum remitted by the plaintiff, he cannot afterwards recover it back, notwithstanding he should allege, that he had been induced to make the agreement, or to give the release, through the artifices of the defendant, unless, however, he can prove that the defendant had practised fraud upon him, by causing him to lose his documents, or preventing him from producing the witnesses by whom he could have established his demand, and that it was by these means he had been induced to acquit the debt or any part of it; for, on making such proof, he may claim and recover back that which he had remitted. (1)

LAW 35.

That a man cannot claim that which he had given in marriage or for pious uses.

If a man believing himself to be the relation of a woman, or that he owed her a debt, should give her a dowry or a marriage gift; although he should discover his error, after her marriage, nevertheless he could neither claim nor recover back what he had given her, on that account; and this because such donation is a pious work. We also say that the expenses which a man had incurred in rearing up any one through religious motives, cannot be recovered back: unless the person so reared up should be a woman, and he, or one of his sons, should wish afterwards to marry her, and either herself or her father should be opposed to it: for in that case, whichever of them

(1) *R. l. 2, tit. 16, b. 5.*

made the opposition to the marriage, would be bound to pay the expenses of her rearing up. And what we say in this law, applies not only to the above cases, but to all others of a similar nature.

LAW 36.

If any one, under the belief that he is the heir of another, should pay his debts, he may recover out of the estate of the deceased, what he had so paid.

Where a man enters upon the estate of a person deceased, believing in good faith, that he had been instituted his heir, or that he inherited from him, in some other way, and while in possession, he pay any debts due from the owner of the estate, in the name of the deceased and not of his own; and he should be afterwards obliged to return it to another heir who came forward and claimed it, and who appeared to have a better right than himself: in that case, he ought, before he delivers up the estate, to be reimbursed for the debts which he can shew he had justly paid, out of his own effects, in the name of the deceased; and he will not have any claim in this respect, against the persons whom he had paid. And if he should be obliged to deliver it up, before he had been reimbursed, he may afterwards claim and recover back what he had so paid, of the heir who inherited the estate. If, however, he should not pay the debts, in the name of the deceased, but in his own, believing that he owed them; he may then, if he choose, claim back what he had paid, of those who had received it: and if he cannot recover it of them, he ought to be paid by

the person who succeeds to the estate ; as it is but just and proper, that he who takes the estate and enjoys its profits, should be charged with the payment of its debts.

LAW 37.

If a man pay a debt which he did not owe, he may recover it back, together with its fruits.

If a man pay a thing which he did not owe, and it be of a nature to produce fruits of itself, it ought to be restored to him, together with the fruits derived from it by the person to whom it had been paid. We likewise say, that if he who received the thing, should sell it, having acted in good faith at the time and after he had received it, believing he had a right to it, he ought to return the price to the person of whom he received the payment : but if he should lose the thing by accident, or if it should die, he will not be bound to pay for it. But if acted in bad faith, at the time he received it, or afterwards, knowing he had no right to it ; then, whether he sell or lose it, he will be bound to pay its just value, at the discretion of the judge. (1)

LAW 38.

Whether he who receives a slave in payment, can enfranchise him,

If a man give a slave, in payment of a debt which he was not bound to pay, and the person who receives him, enfranchise him ; the enfranchisement will be

(1) C. art. 12, 13 & 14, p. 320.

valid. But if such person acted in bad faith, at the time he received him, or at any time afterwards, and before he enfranchised him, knowing that he had no right to him ; he will be bound to pay the value of the slave to his master. And if he received the payment in good faith, believing he had a right to it ; then he will not be bound to pay the estimated value of the slave, in as much as he enfranchised him, under the belief that he was his property. But he ought to transfer to him who made the payment, all the rights he has on the freedman, in virtue of the enfranchisement.

LAW 39.

If he who owes one of two things, should pay both, which of them he may recover back.

Where one man promises to give another, one of two things, saying : “ I promise to give you a horse or a mule ;” or by designating other things, in the same manner, and he afterwards, through error, pay both of the things designated, believing that he owed them, he may claim back whichever of them he pleases, if both be living. But if one of them be dead, he cannot require that the other which is living, should be restored to him.

LAW 40.

That he who does work for another, erroneously believing he was bound to do it, may demand the price thereof.

Men sometimes think themselves bound to do certain work, when in truth they are not. Wherefore we say that if any artificer do any work, for another per-

son, believing himself bound to do it ; as if he should build a house, a ship or other similar thing appertaining to his trade, or any thing else whatever, and after it is finished, he discover that he was not bound to have done it, in that case, the person for whom it was done, ought to pay him, as much as the work might have cost, had it been executed by another workman of equal skill.

LAW 41.

If one man release another from an obligation, in consideration of something which the obligor undertakes to give or to do, and the latter fail to comply with the second agreement, which of the two obligations he may be required to perform.

Where one man releases another from an obligation, in consideration of something else which the obligor undertakes to give or to do, so that the agreement be contracted anew : if, then, the obligor should not comply with his second obligation, it will be at the option of the creditor to compel him to comply with either the first or second, in the same manner as before the release had been given. And the debtor cannot excuse himself, by saying he was released from the first obligation, in as much as he had failed to comply with the second, which had been contracted in consideration of the release. (1)

(1) *R. l. 2, tit. 16, b 5.*

LAW 42.

What are the legacies that may be revoked, after they had been paid.

Where a man has been appointed testamentary executor, in order to pay the legacies mentioned in the will, and he pay them accordingly ; if the will should be afterwards revoked for any just cause ; as where it should appear to be a forgery, or that the testator had not the legal capacity to make it, or to bequeath a legacy ; or should be revoked by another will subsequently made : in such case, we say that the person entitled to inherit the testator's estate, may claim and recover back the legacies of those to whom they had been paid. (1)

LAW 43.

That when a man receives one thing, on condition of doing another, he ought to restore what he had received, if he should not comply with his promise.

Men sometimes give one another certain things by way of payment, on condition that they who receive them, shall do some other thing in turn : as where one man gives another a sum of money, or something else, in order that he may enfranchise a slave whom he has in his power. Wherefore we say that since the payment was made under such condition, the person who received it, will, in any event, be bound to comply with his promise, or in default thereof to re-

(1) *R. l. 6, tit. 4, b. 5.*

turn to the other, what he had so received, and pay him all the loss and damages he had sustained on that account. And what we say in this law applies to every other case, where one man receives any thing from another, for something else he promised to do. (1)

LAW 44.

That they who receive money, to go on a mission, ought to return what they received, if they should not go.

Men sometimes send others on missions (*mandaderia*) and give them money to defray their expenses, and when they are ready to set out, are prevented from going, either because they who were to send them, had changed their minds, or because they themselves had fallen sick, or were prevented by some similar impediment. In such case, we say that if the departure of the messenger be prevented by any of these causes, he ought to return the money he had received, if it had not been expended: but if the whole of it had been expended, in making the necessary preparations for the journey, he will not be bound to repay any part of it; and if the whole had not been expended, then he ought to return as much as remained of it. But if the messenger himself had changed his mind, after he had received the money for his expenses, he would be bound to return the whole, whether he had expended it or not.

(1) *R. l. 2, tit. 16, . 5.*

LAW 45.

That he who enfranchises a slave, in consideration of what another promises him, ought to be paid the same.

If a man enfranchise his slave, in consideration of a sum of money or other certain thing which a third person promises to give him, the enfranchisement will be valid ; and if such third person be afterwards unwilling to comply with his contract, he may be compelled to pay the estimated value of the slave, together with the loss and damage caused by his non-compliance, for the amount of which the person enfranchising the slave, shall be believed under his oath, the same being previously fixed by the judge of the place. And what we say in this law relative to slaves, applies likewise to all other contracts by which men obligate themselves, the one to do a thing, and the other to give or to do something else in turn. (1)

LAW 46.

Whether he who pays or gives any thing to another, in order that the latter might do something else for him, can, or cannot claim back what he had paid or given, if the obligor should not comply with his promise.

Where one man gives another a sum of money or any thing else, expressly declaring at the time, that he gave it, in order that the latter might do some other thing for him ; as that he might be his lawyer, or that he might go to any particular place with him, or for

(1) *R. l. 2, tit. 16, b. 5.*

other similar purposes, expressly saying what : if then the person who received the thing, should not accomplish the object for which it was given, the other may claim it back, and he will be bound to restore it. But if the person who gave the thing, had not expressly declared at the time for what purpose he gave it ; notwithstanding he may have given it, with the intention that he who received, should do something for him in turn ; as that he should go with him on a journey, or should perform some other service for him, or should become on that account, more friendly towards him ; yet in that case, he would not have a right to claim back what he had given : for in as much as he had not specified the cause for which he had given the thing, it is presumed that he had made a donation of it : wherefore he cannot afterwards claim it back, although he should allege that he had been induced to promise or to give it, in order that the person receiving it, might render him some service or give him something else in turn. (1)

LAW 47.

That he who dishonestly receives a thing in payment, ought to restore it.

Men sometimes make payments and enter into contracts concerning things that are dishonest, unjust and contrary to law : and as the turpitude of the transaction sometimes proceeds wholly from him who gives the thing, sometimes from him who receives it, and sometimes from them both, we will here explain what

(1) *R. l. 2, tit. 16, b. 5.*

distinction must be made between them. And we say that the turpitude of the transaction proceeds wholly from the person receiving the payment or promise, where another agrees to give him any thing, to abstain from committing theft, murder, sacrilege, adultery, or other similar offence which one is bound by nature and by law, to abstain from committing : whatever a man receives for such cause, he will be bound to restore, or if he had not received any thing, he would be bound to release the obligor from his promise ; as it is not proper that a man should receive a price for abstaining from doing what he was naturally bound not to do. We likewise say, that where one man gives another, any thing in deposit, on a loan, or on hire, and the latter be unwilling to restore it, unless the owner pay him something therefor : if, then, the owner immediately give or promise to give him something ; he will be bound to restore it or to release the owner from his promise, for it is very base for a man to receive a price for doing that which he was bound by law to perform. And so we say it would be, if one man should steal the slave or child of another, and refuse to restore it, unless the parent or master pay him something therefor : for whatever he may receive on that account, he will be bound to restore.

LAW 48.

Whether a man can claim restitution of the thing which he had given to be released from captivity.

If a man be taken captive, or detained in the power of the enemy or of thieves, and another person inter-

fere and say to him, that if he will give him something, he would release him from imprisonment: the person confined would be bound by the contract, if the other should perform what he had promised. And if the former pay what he had obligated himself to give, he cannot afterwards require restitution thereof, unless the person who received it, were an associate with the others, and had been present, or had aided them and advise his imprisonment, for then he may claim and recover back what he had given on that account. And what we say in this law, with respect to the imprisonment, or captivity of a man, applies likewise to all other things which a man gives or promises, in order that he may recover back what he had lost by theft or robbery.

LAW 49.

That if a man pay what he had promised through force or fraud, when he might legally dispense with doing it, he cannot afterwards claim restitution thereof.

If a man know that the contract by which he obligates himself towards another, is dishonest, and that he had a legal right to dispense with the execution of it; and he nevertheless comply with it and pay what he had promised, he cannot afterwards claim restitution of the same; and if he should, the other will be bound to restore it. So we say, it would be, with respect to what a man promises to give by means of any fraud, force or fear, that had been practised upon him, for a promise obtained in this or any other similar way, would not be valid, nor would the obligor be bound to comply with it. But if he should afterwards volunta-

rily pay or give what he had promised, he cannot then claim restitution thereof. (1)

LAW 50.

That the wife cannot claim restitution of what she had given her husband, knowing that she could not marry him.

If a woman agree to contract marriage with a man with whom she knows she cannot lawfully intermarry, either because she was a relation, or because she had another husband, or for any other similar cause of such nature as in law would prevent her from marrying him; and he ignorant of the impediment, marry her, she cannot afterwards claim restitution of what she had given him in dowry, nor will he be bound to restore it, although the marriage should be dissolved on that account, in as much as she was guilty of great baseness, (*torpedad*) in endeavouring to marry a man whom she knew she was forbidden by law to marry. Wherefore she cannot claim back what she had given: and this is a case in which the turpitude of the transaction, comes entirely from the person who gave the thing. And what we say in this law, applies likewise to all other similar cases, wherein the turpitude of the transaction proceeds from the party who gives and not from him who receives the thing.

(1) *R. l. 5, tit. 9, b. 3.—ibid l. 16, tit. 5, b. 2.*

LAW 51.

If both parties to the marriage knew that they could not legally contract it, all that they had mutually given to each other, ought to be forfeited to the king's chamber.

If both husband and wife knew, at the time of their marriage, that there existed legal impediments to their contracting it, and they mutually give any thing to each other, by way of dowry or *arras*; if the marriage should be afterwards dissolved on account of such impediment, neither of them can claim and recover back what they had so given, in as much as both are equally affected by the turpitude of the transaction; unless they were minors under twenty-five years of age; for in that case, they would be excused on account of their minority, and they might recover back what they had so given to each other. So we say it would be, where the parties acted, through error, not knowing of the impediment, notwithstanding they were above twenty-five years of age; for if the marriage should be dissolved, after they are informed of their error, they may then recover back what they had mutually given each other, on account of the marriage.

[No other part of this law in force.]

LAW 52.

That if either of the parties give any thing to the judge to induce him to render judgment in his favor, it will be forfeited to the king.

If either of the parties to a cause, whether justice be on his side or on that of his adversary, give a sum of money or any thing else to a judge that he might ren-

der judgment in his favor, he cannot afterwards recover back what he had given, nor will it belong to the judge.

[No other part of this law in force.]

LAW 53.

That a man cannot claim restitution of what he gives a woman to corrupt her, notwithstanding she should not comply with her promise.

If a man give money or any thing else to a woman of good character, in order to corrupt her, and she receive it, promising to comply with his request; if then she refuse to comply accordingly, he cannot claim back what he had given, nor will she be bound to restore it, in as much as both are equally implicated in the turpitude of the transaction, and therefore the right of the person in possession, is preferred in law; and so it would be if a man should give any thing to a woman of bad character, that he might have carnal commerce with her, he could not afterwards recover it back, as the turpitude of the transaction proceeded entirely from him: for although a woman of such description commit an offence in having connexion with men, yet she commits none nor is there any turpitude in receiving what they give her.

LAW 54.

That a man may recover back what he had given in order to prevent the detection of an offence.

If a man commit adultery, murder, theft, or any other similar offence, and give something to any one,

not to denounce him, notwithstanding the act be in itself wicked, unlawful and base, nevertheless there is no turpitude in giving any thing to prevent the danger of being detected ; wherefore he may claim restitution of what he had so given ; for it is but natural that every man should endeavour, all that is in his power, not to expose his life or reputation. But the person who receives any thing on that account, commits a dishonest action : first, because if he wished to save the guilty from death, he should do it through the natural love which one man ought to have for another, and not for a price. Secondly, because by receiving a reward for concealing a malefactor, he betrays the law, sells and prevents the administration of justice : Wherefore he ought to restore what he may have so received. And whoever promises to give any thing, through such a motive, will not be bound to comply with his promise.

TITLES

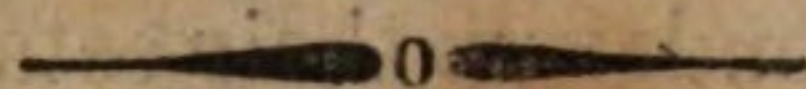
Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of **LAS SIETE PARTIDAS**, which treats of the manner in which debtors abandon their estates to their creditors.

Digest lib. 42. tit. 3. - - *De cessione bonorum.*
 Code lib. 7. tit. 61. - - - *Qui bonis cedere possunt.*
 Novels Col. 9. tit. 18. - - *Ne quis cogatur bonis cedere.*
 Domat's Civil Law, part 1. b. 4. tit. 5. sect. 1 & 2.
 Recopilacion de Castilla b. 5. tit. 16. ll. 5. 6. 7. 8.
 Civil Code b. 3. tit. 8. chap. 5. sect. 1. § 5.—ibid b. 3. tit. 16.

OF DEBTORS WHO ABANDON THEIR ESTATES TO THEIR CREDITORS.

- That debtors may surrender up their estates, when they have not the means of paying their debts ; and before whom and in what manner it may be done, - - - - - **LAW 1**
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- What force has the abandonment which a debtor makes of his estate, on account of the debts he owes, - - - - - **3**
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- When a man has many creditors and he asks them to remit something of their claims ; if some of

them consent to do it and others not, what opinion ought to prevail, - - - - -	LAW 6
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TITLE XV.

That debtors ought to surrender up their estates when they have not the means of paying their debts; and that the fraudulent alienations which they make of their property, may be revoked.

LAW 1.

That debtors may surrender up their estates, when they have not the means of paying their debts; and before whom and in what manner it may be done.

Every free man, whether he be master of his own actions, or subjected to the power of another, may abandon his estate, when he has not the means of pay-

ing his debts. And he must do it, before the judge (*a*) either in person, or by his attorney in fact, or by letter (*su carta*), by acknowledging the debts that he owes; or when judgment has been rendered against him, and not before (*b*): for if he do it in any other manner, it will not be valid. And he must make the abandonment to those to whom he is indebted, declaring that he has not wherewith to pay them. And then the judge ought to take possession of all the effects which he thus abandons, except his wearing apparel (*paños de lino*); unless the debtor were the father, grandfather or other ascendant of the creditor, or the son or other descendant, or the husband or wife, or the freedman or patron; or were a partner indebted to his partner; or were a person of whom something was claimed, on account of a donation he had made: for in either of these cases, the judge ought to leave so much of his estate, as would enable him to live in a suitable manner, and sell the overplus at auction, and pay the proceeds of the sale, over to the above mentioned creditors. (1)

LAW 2.

That the estate of the debtor, when he abandons it, ought to be divided among his creditors.

When all the debts of a person who had abandoned the whole of his estate, are of the same nature or kind,

(a) Potest enim fieri cessio extra judicium. Greg. Lopez.

(b) Invito creditore intellige. Greg. Lopez.

(1) R. ll. 5, 6, 7. tit. 16, b. 5.—C. art. 166, 167, 168 & 170, p. 294.

the judge ought to distribute among the creditors, the sum for which his effects had been sold, paying to each of them, the proportional part due him, be the same, more or less. But if all the debts should not be of the same kind, some of the creditors being preferred to the others, either because the estate of the debtor had been first affected in their favour, or because they had some other right to the same, in the manner we have mentioned under the title of pledges: in that case, such debts ought to be first paid, notwithstanding nothing should afterwards remain for the payment of the others. But if the debtor who had thus abandoned his estate, should declare, before the whole of it was sold, that he desired to take it back, in order that he might pay his creditors, or immediately defend himself against their claims, then no part of it ought to be sold, but on the contrary we say, that he ought to be heard.

LAW 3.

What force has the abandonment which a debtor makes of his estate, on account of the debt he owes.

The abandonment made by a debtor of his property, of which we spoke in the preceding laws, has such force, that he cannot be afterwards sued (*emplazado*) by his creditors, nor will be bound to answer to them in court; unless he may have since made such considerable acquisitions (*ganancia*), as to be able to pay the whole or a part of his debts, and have a sufficiency left to live upon. And although they who abandon their estates, are not bound to answer their creditors in court, as is above said, yet their securities cannot avail

themselves of the same defence, but will be bound to pay whatever remains due upon the debts for which they were securities, notwithstanding their principals should not have the means of doing it themselves. (1)

LAW 4.

What penalty they deserve, who are not willing either to pay their debts, or to abandon their effects.

When a man is condemned to pay a debt, and will neither pay it nor abandon his estate, according to what is said in the preceding laws, the judge ought to put him in prison, at the request of his creditors, and there detain him until he pays what he owes, or abandon his estate. And if while in prison he should dissipate (*malmetiese*) the whole or any part of his estate, he cannot afterwards be heard, notwithstanding he should desire to make the abandonment, unless he should obligate himself, and give security to put his property in the same condition it was before he had been committed to prison. (2)

LAW 5.

Where a man owes many persons and he asks them to give him time to pay what is due to them; and some of them grant it and the others not, what opinion shall prevail.

Where a man is indebted to many persons, and before he abandons his estate, he calls them together and

(1) C. art. 172, p. 294.

(2) R. l. 7, tit. 16, b. 5.

asks them to grant him a certain fixed time at which he will pay them ; if all of them do not grant it accordingly, then he ought to have such delay as the majority of them shall have granted him, notwithstanding the others should not consent to it. And we say, that by a majority of the creditors, is understood those to whom the greater sum is due. And if they should not agree among themselves, some being willing to grant the delay, and others declaring that they were unwilling to do it, and that they preferred the debtor should either pay, or abandon his effects : then, if the creditors be equal in number and amount on both sides, the opinion of those shall prevail, who are willing to grant the delay ; for it is to be presumed that they are actuated by compassion towards the debtor. And if they happen to be equal in their credits, and unequal in the number of persons, the opinion of the majority of persons shall prevail. (1)

LAW 6.

When a man has many creditors, and he asks them to remit something of their claims ; if some of them consent to do it and others not, what opinion ought to prevail.

When the debtor, before he abandons his property, asks his creditors for a remission of a part of what he owes them, promising to pay the balance, and they disagree among themselves, some of them being willing to remit a part and the others not : then every thing

(1) *R.l.* 7, *tit.* 19, *b.* 5.—*Antos* 49 & 79, *tit.* 4, *b.* 2.—*C. art.* 1 & 3, *p.* 438.

which we said in the preceding law, relative to the delay asked by the debtor, ought to be observed with respect to any remission they may make. And we moreover say, that although any one of the creditors should not be present when the others granted the remission, nevertheless what these others may have done in that respect, will be valid, and cannot be annulled by the absent creditor, unless the sum due to him be greater than that due all the others put together; for then he will not be prejudiced by what they may have done without his concurrence. We likewise say, that if some of the creditors remit to the debtor a part of the debt, out of the presence of another creditor, to whom any specific part of the debtor's estate was affected, or who has any particular thing of his, in pledge, he will not be prejudiced by the remission made by the other creditors: for he will retain unimpaired, all his right to the things affected in his favour, or which had been pledged to him. (1)

LAW 7.

That if the debtor alienate his estate to the prejudice of his creditors, the alienation may be rescinded.

We say that the *personal debtor*, is he whose person alone is bound for the debt, and not his property. And it sometimes happens, that such a debtor, after he has been condemned by a judgment of court, to pay a debt, and the judge has issued an order for the

(1) *R. l. 7, tit. 19, b. 5.—Autos 49 & 79, tit. 4, b. 2.—C. art. 6, p. 440.*

delivery of a portion of his effects, that he alienates the whole of them in order that no part of them may be found to be delivered to his creditors. We therefore say, that such alienation may be rescinded by those entitled to the delivery, at any time within one year from the day they are informed of it: as it is to be presumed, that a debtor who sells the whole of his estate in this manner, does it maliciously and with an intention to defraud. And so we say it would be, if such a debtor should give any thing to another person, either by donation, during his life, or by will; for if enough should not remain to satisfy his creditors, they may rescind the donation or legacy in the manner above mentioned. But if he should not alienate the thing by donation or by will, but should sell, or exchange it, or give it in dowry or pledge: then we say that if it can be proved that the person who received it, in either of these ways, knew that the debtor had alienated it maliciously and fraudulently, such alienation may be rescinded within the time above mentioned, unless the person so receiving it, were a minor, for as such, he would not be obliged to return it, unless he be reimbursed what he had given for it, notwithstanding it should be proved that he knew of the fraud. But if the alienation cannot be proved to be fraudulent, as is above said, or no demand should be made in that respect, within the time above prescribed, it could not afterwards be revoked on that account. (1)

(1) *R. II. 6 & 7, tit. 19, b. 5.*

LAW 8.

That the sale of the debtor's property, when forbidden by his creditor, may be annulled.

Men sometimes venture to purchase the property of those who are indebted to others, notwithstanding they are forbidden to do so by the creditors, or their attorneys or stewards. Wherefore we say, that if in this and other similar cases, the remaining effects of the debtor, should not be sufficient to pay his debts, the alienation may be annulled within the time mentioned in the preceding law.

LAW 9.

That if he who is indebted to many persons, pay one of them, the payment cannot be revoked.

A man who has many creditors, sometimes prefers the interest of one of them, to that of the others, and pays his debt before any seizure or delivery (*entrega*) of his property is made. In this case we say, that although the remaining property of the debtor, should not be sufficient to pay the sums due to the other creditors, yet they cannot compel those who have been thus paid to return what they had received, to the debtor. And so we say it would be, if the debtor should make any payments before he abandons his estate: but if he were to pay after the delivery or abandonment of his goods had been made, whether he did it voluntarily, or were compelled thereto by the judge; then the other creditors may require him who has been paid, to return what he has received; and it must be

accordingly returned and added to the other effects abandoned by the debtor, and the whole divided among his creditors, in the manner above mentioned.

LAW 10.

Of the debtor who departs from the country, because he has not the means of paying his debts.

If a man depart from the country because he cannot pay what he owes, and one of his creditors, knowing that he had fled, go in pursuit of him, with the intention to arrest him, and seize what he had carried off with him, and overtake him in an uninhabited country, or in a place where there is no judge: he may then, of his own authority, arrest his person and seize all the goods he had taken with him. But if he overtake him in a place where there is a judge, he ought not to arrest him, of his own authority, but must apply to the judge for that purpose, who ought to arrest him accordingly. And every thing the creditor finds upon him, he may retain for himself, to the amount of the sum due him from the debtor, and he will not be bound to return with it to the other creditors. But if he find more than sufficient to satisfy his debt, he will be bound to give the overplus to the other creditors.

LAW 11.

That the property of the debtor which had been fraudulently alienated, ought to be restored, with all its fruits.

The thing which the debtor alienates maliciously and in fraud of his creditors, ought to be restored to the condition in which it was before it was alienated, together with all its fruits existing at the time of the

alienation, as well as those which arise from it, from the day it is judicially demanded, until judgment be rendered against the person who was in possession; deducting the expenses incurred on account of the fruits, or of the amelioration of the thing itself. But the fruits it may produce from the day it was alienated, until suit was brought for it, ought to remain to the purchaser of the thing. (1)

LAW 12.

That the releases which men fraudulently make to their debtors, may be revoked.

There are men who sometimes maliciously release debts due to them, in order to defraud their creditors; therefore we say, that such release will not be valid, if they in whose favour it was made, had a knowledge of the fraud. And if the person making the release, had taken another, as security for the debt which he wished to remit to the principal debtor; if then he should release the security who knew of the fraud, while the principal debtor were ignorant of it: the release would not avail the security, but he will be obliged to pay the whole debt, if he have the means; and if he have not, then the principal debtor may be compelled to pay that which remain unpaid by the security. We likewise say, that if the release be made to the principal debtor, he knowing of the fraud, while the security is ignorant of it, then the latter will be discharged from the debt, and the principal debtor will be bound to pay it, in the same manner as if no release had been made.

(1) *R. ll. 6 & 7, tit. 19, b. 5.*

HERE COMMENCES THE

SIXTH PARTIDA

OF THIS BOOK, WHICH TREATS OF

WILLS AND INHERITANCES.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
Wills.

Digest lib. 28, tit. 1. - - *Qui testamenta facere possunt,*
&c.

Digest lib. 29. tit. 6. - - *Si quis aliquem testari prohibu-*
erit vel coegerit.

Institutes lib. 2. tit. 10 - *De testamentis ordinandis.*

Institutes lib. 2. tit. 12. - *Quibus non est permissum fa-*
cere testamentum.

Code lib. 6. tit. 22. - - *Qui testamentum facere possunt*
vel non.

Code lib. 6. tit. 23. - - *De testamentis et quemadmodum*
testamenta ordinentur.

Code lib. 6. tit. 34. - - *Si quis aliquem testari prohibue-*
rit vel coegerit.

Domat's Civil Law, part 1. b. 3. tit. 1.

Leyes del Estilo, l. 149.

Ordenamiento de Alcalá, tit. 19.

Ordenamiento Real, b. 5, tit. 2.

Recopilacion de Castilla, b. 5, tit. 4.

Recopilacion de las Indias, b. 1, tit. 13, l. 9.

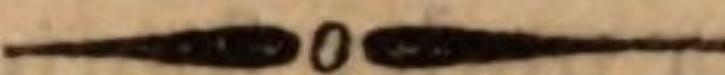
Civil Code, b. 3, tit. 2, chap. 6.

OF WILLS.

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TITLE I.

LAW 1.

What is meant by a will ; what benefit arises therefrom ; how many kinds there are, and how it ought to be made.

Testatio and *mens* are two Latin words which mean in common speech as it were the testimony of a man's mind. And it is from these words that the term testament is derived ; for in it, is included and regularly contained the will of the testator, by which he appoints his heirs and bequeaths his estate, in the manner he desires the same should be disposed of after his death. From testaments great advantages arise, when they are legally made ; for immediately upon the death of the testator, all dispute is thereby prevented that might arise among the relations who expected to inherit his estate. There are two kinds of wills : the one is that which is called in Latin, *testamentum nuncupativum*, which means a declaration (*manda*) open-

ly made before seven witnesses, by which the testator makes known by words or in writing, who the persons are whom he institutes as his heirs, and the manner in which he disposes of his other property. The other is that which is called in Latin *testamentum in scriptis*, which means a declaration made in writing, and in no other way. This will ought to be made before seven witnesses called at the instance of the testator, for that purpose ; neither of whom should be a slave or a minor under fourteen years of age, nor a woman, or an infamous person. We likewise say that each of the witnesses ought to write his name at the end of the will ; and if one of them should not know how to write, either of the others may do it for him at his request. We also say that the testator ought to write his name at the end of the will, and if he should not know or could not write, then another may do it for him at his request. (1) (a)

[No other part of this law in force.]

LAW 2.

That a man may make a will in writing, in such a manner as that the witnesses shall not know what is contained in it.

If a man should wish to make his will in writing, as we said in the preceding law, and should desire it to be secret, so that none of the witnesses might know

(1) R. ll. 1 & 2, tit. 2, b. 5.—C. see the laws of sect. 2, chap. 6, tit. 2, b. 3.

(a) The civil code does not require the same number of witnesses to the nuncupative wills. C. art. 92 & 96, p. 228.

what it contains, he may do it in the following manner : he ought to write it with his own hand, if he know how ; and if he do not, he may call any other person he pleases, in whom he can confide, and request him to write it in secret. And after it is written, he ought to seal it up, and to leave as much blank paper on the outside, as is necessary for the witnesses, to write their names upon : he ought then to call on seven witnesses, as is said in the preceding law (a), showing them the folded writing and telling them ; “ this is my will, and I request you to write your names on it.” He ought, moreover, to write his name, or cause it to be written, after the witnesses had written theirs, in their presence ; saying : “ I declare that this is my will which I such a one made or cause to be made.” (1) (a)

LAW 3.

What rule ought to be observed by testators in making their wills.

They who wish to make their wills, shall observe generally, as a rule, that after they have once begun them before witnesses, they should not turn aside to do other things foreign to their purpose, until they have finished them, unless for some indispensable cause ; as where the pain of sickness increases at that moment, or where they are under the necessity of eating, drinking, or of doing any thing else which they cannot naturally avoid doing. For in any of these

(1) *R. l* 2, *tit.* 4, *b.* 5 — *C. art.* 99, 100 & 101, *p.* 228 & 230.

(a) By the civil code, art. 99, p. 228 & 230, the presence of a notary public is also required.

cases, the testator may desist from what he had begun, until the impediment had ceased, that he may return and finish the will. (1)

LAW 9. (a)

Who they are that cannot be witnesses to wills.

Neither they who have been condemned for having made malicious songs or libels (*Ditados*) against any one, with the intention of defaming him; nor they who have been condemned for having committed any crime, such as theft, murder or any similar or greater offence; nor women; nor minors under fourteen years of age; nor slaves; nor the deaf or dumb; nor the madman, while he is deprived of his reason; nor can the slave of another be witness to a will. Yet if either of the witnesses who were present at the time the will was made, should pass for a free man, notwithstanding he should afterwards turn out to be a slave, the testament will not be void on that account. (2)

[No other part of this law in force.]

(1) *R. l. 1, tit. 4, b. 5.*

(a) The laws 5, 6, 7 & 8, which precede this, are not in force; they relate to forms of testaments which are no longer recognized by the civil code. C. art. 1, p. 208, & art. 89, 108 & 205, p. 226. 232 & 254.—
(For the heads of these laws, see the Index preceding this title.)

(2) *C. art. 105 & 106, p. 230 & 232.*

LAW 10.

Whether an hermaphrodite can be a witness to a will.

By *hermaphroditus* in Latin, is meant in common speech, a person who partakes of the nature of man and woman. And we say that if such a person partake more of the sex of a woman than of a man, she cannot be witness to a will or to any other disposition *mortis causa* (*mandas*) which a man makes of his property. But if he approach nearer the sex of a man than that of a woman, then he may be a witness in such cases.

LAW 11.

Whether or not legatees can be witnesses to a will.

If a dispute arise between the person mentioned as heir in the will and the relation of the deceased, who wish to annul it; in that case, we say that the legatees may be witnesses, if they were present when the will was made. And so we say it would be if any person to whom the testator had bequeathed something by his will, should have a dispute with the heirs, concerning the things so bequeathed to him. For then the other legatees mentioned in the will, may be witnesses in this respect, in as much as they have no interest in the event. Nevertheless, neither the heir, nor his descendants, nor his father, can be witnesses in any dispute that may arise between him and the relations of the deceased, or with other per-

sons, concerning the will in which he is instituted heir. (1) (a)

[No other part of this law in force.]

LAW 12.

Upon what substances the will may be written.

A will may be written upon parchment, paper or on tables, whether covered with wax or otherwise, or upon any thing on which it may be written and read. And we also say that a man may make his will by several different writings of the same tenor, one of which the testator may keep himself, and the others he may deposit in some secure place, as the vestry of a church, or in the care of a friend. They must be moreover made in the same manner and in the same terms, so as to agree with one another. Yet if either of them, should be defective, it would not affect the others which were complete.

LAW 13.

Who were or who were not capable of making a will.

All persons may make their wills, except those who are prohibited by the laws of this code, and who are as follows: the male minor under fourteen, and the fe-

(1) *R. l. 4, tit. 4, b. 5.*

(a) By the civil code, husband and wife, ascendants and descendants, cannot be witnesses for or against each other: nor can wills be witnessed by those who are instituted heirs or named legatees therein, either universally or under a universal title. C. art. 106, p. 232, & art. 248, p. 312.

male under twelve years of age, notwithstanding they should not be under the power of their father or grandfather; and this because they are not of an age to have the requisite understanding: nor the madman or idiot, while they are deprived of their reason. We also say that persons who are born deaf or dumb, cannot make a will; but if they have become so by accident or disease or otherwise, and know how to write, they may make their wills, by writing them themselves; but they cannot, if they knew how to read only. And so a man born dumb who knows how to read, may make his will, though he be deaf, which seldom happens. Yet a person born deaf, or who had become so by accident, may make his will, if he can speak. (1)

[No other part of this law in force.]

LAW 14.

In what manner a blind man may make his will.

A blind man cannot make a will unless in the following manner; he must call seven witnesses, together with a notary public, and declare in their presence, the manner in which he intends to make his will, and inform them who are the persons he institutes as his heirs, and what are the legacies he gives: and the notary ought to commit the whole to writing before the witnesses; or if it had been previously written, he ought to read it to them, and after having been thus written and read, the testator ought expressly to declare that such is his will. And each of the wit-

(1) *R. l. 4, tit. 4, b. 8.—C. chap. 2, tit. 2, b. 3.*

nesses ought to sign his name to it, if he knows how to write, and if he should not know how, he ought to cause another person to do it for him. And if a notary public cannot be procured, then they ought to get some other person to write it, and have besides him, eight witnesses, in the place of the notary. And these formalities ought to be observed, in making the will of a blind man, lest fraud should be committed. (1)

LAW 17. (a)

That they who join religious orders, cannot make a will.

But if he or she (the father or mother or other ascendant) should have any children or descendants, he may divide his estate among them, in such manner as each of them shall have his legal portion which is called in Latin *parte debita jure naturæ*, and which they ought to have free and quit of all conditions or incumbrances whatever. (2)

[No other part of this law in force.]

LAW 20. (b)

That a will is revoked by the posterior birth of a child, or other person adopted by the testator.

Posthumus in Latin, properly speaking, means in common speech, a child that is born after the death of

(1) *R. l. 2, tit. 4, b. 5*

(a) The laws 15 and 16 are not in force; for their heads, see the index of this title.

(2) *C. art. 20, p. 212.*

(b) The laws 18 and 19 are not in force; see for their heads the index of this title.

his father, and so a child born after the father had made his will, may be called *posthumus*. By the birth of such children, the wills, made by their fathers, in which they are not instituted heirs, are revoked. (1)

[No other part of this law in force.]

LAW 21.

In what cases a first will is revoked by one subsequently made.

A first will may be revoked by a posterior one that is regularly (*cumplidamente*) made; unless where the testator had instituted a person for heir in his first will, and afterwards receive news of his death, when in truth, it was not the case, but believing it to be so, he should make another will in which he should say: "since I cannot have such a one who is dead, as I am informed, for my heir, then I institute such other person;" for if it be afterwards discovered that the first heir were living, the last testament will not annul the first: and the heir instituted by the first, ought to have the estate, according to the condition of the same, and the second heir will have no right to claim any thing, in as much as the motive through which the testator instituted him, was not well founded. Nevertheless the legacies contained in both wills, either for pious purposes or given to the relations or friends of the deceased, will remain valid.

(1) C. art. 74, p. 224.

LAW 22.

For what reasons the first will is not revoked by that which is made afterwards.

There are cases in which the last will, though regularly made, does not revoke the first: as where the father, by his first will, institutes for heirs, his children descended from him, and afterwards makes another in which he does not mention the first; then the first would not be revoked by the last, as we have above said. So likewise where the testator declares thus: "I wish that the will which I now make, should for ever remain valid, and that every other will, whether made before or afterwards, should be void." For if the testator happen afterwards to change his mind and make another will, the first would not be thereby revoked; unless he had expressly declared in the second, that he revoked the first, and that the expressions contained in the first, should not prejudice the second. (1) (a)

[No other part of this law in force.]

LAW 23.

That the second will ought to be made in a regular manner, that it may have the effect to revoke the first.

When a man has made a complete and regular will (*acabadamente fecho*), and wishing afterwards to re-

(1) C. art. 185, p. 250.

(a) By the civil code, the testator cannot renounce his right to revoke his will, and any declaration to that effect is considered as not written. C. art. 182, p. 248.

voke it, should commence another but should not finish it, on account of some impediment or other cause, the first would not be thereby revoked. For it is proper that a will regularly made before seven witnesses, should not be revoked by another which had not been completed. But if a man should make a regular will, in which he institutes for heir, a person who is neither his child or descendant, and he afterwards declare before five witnesses: "I wish that such a one that is mentioned in my will, should not be my heir, as he does not deserve it for having been ungrateful or for having offended me;" for these and other similar causes, the heir will lose his right to the estate of the deceased, and it will accrue to the king, since the testator does not wish the person he had instituted, should remain his heir, on account of the offence he had committed, and had not mentioned any other in his will. But if he had instituted some other person in his place, he will be entitled to the estate, and the king would have no claim to it. (1) (a)

(1) *R. l. 12, tit. 8, b. 5.*

(a) By the civil code the revocation of a will may be made either by another will or codicil, or by any other act executed before a notary and two witnesses. C. art. 184, p. 250. And now when an estate or any portion of a succession remains vacant, whether because the testator had not formerly disposed of it, or because the heir or the legatee is not capable or willing to accept it, it will descend to his legitimate heirs. C. art. 197, p. 248.

LAW 24.

That the will is revoked when the testator tears it up or breaks its seals.

When the testator designedly breaks the seals to his will, or cuts the cord by which they are suspended, or effaces the marks (*senales*), affixed by the notary to the same, or tears up the will, it will be thereby revoked, unless it can be proved that it happened by accident and was not intentionally done, in which case the will shall not be impaired. (a)

LAW 25.

That every man may, until the moment of his death, revoke his will and make another.

Such is the mind of men that it often changes its determinations ; and therefore no one can make his will so firmly, that he cannot afterwards change it, if he choose, at any time before his death, provided he be then of sound memory, and his second will be regularly made. (1)

(a) If a part of this law should not be in force, it has been necessary to translate it with other parts that are.

(1) C. art. 182, ft. 248.

LAW 29. (a)

That he who prevents another from making his will, shall pay double the amount of the loss he thereby causes to the person to whom the testator intended to give a legacy.

Where a man intends to institute any one for heir in his will or to give him a legacy, and a third person prevents him from doing it either by force or fraud; if the impediment or fraud can be proved, such third person will be bound to pay him who was to have received the legacy, double the amount which he has thereby lost.

LAW 30.

(This law, as well as the two following, are not in force; see for their heads the index preceding this title.)

(a) The laws 26, 27 and 28, are not in force, as the penalties therein mentioned appertain exclusively to criminal justice. (*For their heads, see the index preceding this title.*)

TITLES

Of the Roman Laws and of the Civil Code relating to the title of **LAS SIETE PARTIDAS**, which treats of the manner in which written wills made in secret, ought to be opened.

Digest lib. 29. tit. 3. - - - *Testamenta quemadmodum aperiantur, &c.*

Code lib. 6. tit. 32. - - - *Testamenta quemadmodum aperiantur, &c.*

Domat's Civil Law, part 1. b. 3. tit. 1. sect. 3. ll. 18 & 19.

Civil Code, b. 3. tit. 2. chap. 6. sect. 6.

OF THE OPENING OF WILLS.

Who can petition the judge for the opening of a will that is written in secret, - - - - -	LAW 1
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In what manner the will ought to be opened and exhibited, - - - - -	3
What the judge ought to do when the will is made before witnesses without writing, - - - - -	4
In what manner the judge ought to give a copy of the will to those to whom something is bequeathed therein, - . - - - - -	5
What are the reasons which may induce the testator to forbid the opening of his will until a certain time, - - - - -	6

TITLE II.

How wills that are written in secret (en poridad) ought to be opened.

LAW 1.

Who can petition the judge for the opening of a will that is written in secret.

When a will is written in secret (a), the persons named legatees therein, may petition the judge to open it, after the death of the testator. But the petitioner ought first to swear that he does not do it maliciously, but because he believes that something has been bequeathed in the will, either to him or to the person for whom he petitions ; and the reason is that the will does not belong to one person only, though he should be the heir, but to all those who are named legatees in the same. And therefore we say that no agreement or compromise entered into between persons who believe that something had been given to them by will, shall be valid until it be opened. For until then it cannot be certainly known what is written and bequeathed in it, and it may happen that the parties to the said agreement or compromise, should be defrauded thereby. (1)

(1) *R. l. 14, tit. 4, b. 5.*

(a) This is what is called the mystic or secret will. C. art. 19, p. 228.

LAW 2.

At what time one may petition for the opening of a will.

Either of the persons mentioned in the preceding law, may, as soon as the testator is dead, petition the judge for the opening of the will. And if it be in the town or place where the petition is presented, the judge ought to cause it to be brought before him and immediately open it in the manner we shall hereafter prescribe; but if it be elsewhere, he ought to fix a time at which the person in possession of it, should produce it and then open it in like manner. And if the person who detains it, should be contumacious and unwilling to produce it, agreeably to the order of the judge, he will be bound to pay to those who require its production, the whole amount bequeathed to them by the same, together with all the loss and damage they may sustain thereby. (1)

LAW 3.

In what manner the will ought to be opened and exhibited.

The will ought to be opened before the ordinary judge (a) and the subscribing witnesses. But previous to opening it, the judge ought to ask the witnesses, if the will be the same on which they have signed their names; after which it ought to be opened and read in their presence, and after the judge shall have taken

(1) *R. l. 14, tit. 4, b. 5.—C. art. 153, p. 242.*

(a) Now before the judge of the court of probates,

the oath of the witnesses, he ought to cause the will to be transcribed on his records, as well as the declarations of the witnesses, or cause them to be written on the same paper with the will itself, if there should be sufficient space for that purpose. And thereupon the judge shall deliver a copy of the will to those to whom any thing had been bequeathed therein, if they should require it. (1)

[No other part of this law in force.]

LAW 5. (a)

In what manner the judge ought to give a copy of the will to those to whom something is bequeathed therein.

The judge ought to give to the heirs, an entire copy of the will; but if the testator had forbidden that a certain part of it, should be opened; as if he should say: "I desire that such a disposition contained in my will, should, in no wise, be opened nor published until such a time or such a day;" or if he should say: "notwithstanding it be opened, I order that no copy of such a part, shall be given to any person;" for in whatever manner the testator declares his will, it ought to be observed by the judge.

[No other part of this law in force.]

(1) *R. l. 14, tit. 4, b. 5.—C. art. 157, 158, 159, 160, 161 & 162, p. 242 & 244.*

(a) The law 4, which precedes this, is not in force. *C. art. 90, p. 228.* For the head of that law, see the index of this title.

LAW 6.

What are the reasons which may induce the testator to forbid the opening of his will, until a certain time.

Since some persons may doubt as to the reasons which may induce the testator to forbid the opening of his will in whole or in part, as is said in the preceding law; in order to remove such doubts, we say, that if the testator should have a minor son under fourteen years of age whom he institutes his heir, under condition that if the child should die before such a time, that such other person whom he expressly names, should inherit all his estate: the testator fearing that the last mentioned person might seek the death of the child, in order to inherit the estate, if he knew the contents of the will; in such case, he may forbid its being opened until his son shall arrive at the age of fourteen years. And the safest way in which this may be done, according to the ancient sages, is for the testator to write or to cause to be written at the commencement of the paper containing his will, the part thereof which he forbids to be opened and close and seal it, and then write upon the folding, that he forbids that part of his will from being opened, until a certain day, or time fixed, and then write below that part of his will, which he wishes to be opened after his death. For whatever the testator orders in this respect, ought to be observed, and the will opened in no other way than as he directs.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code, which relate to the title of **LAS SIETE PARTIDAS**, which treats of the manner in which heirs ought to be instituted.

Digest lib. 28. tit. 5.	- -	<i>De heredibus instituendis.</i>
Institutes lib. 2. tit. 14.	- -	<i>De heredibus instituendis.</i>
Institutes lib. 2. tit. 19.	- -	<i>De heredum qualitate et differentia.</i>
Code lib. 6. tit. 24.	- - -	<i>De heredibus instituendis, &c.</i>
Novels Col. 1. tit. 1.	- -	<i>De heredibus, &c.</i>
Domat's Civil Law, part 2. b. 1. tit. 1.		
Civil Code b. 3. tit. 2. chap. 6. sect. 3 & 4.		

OF THE INSTITUTION OF HEIR.

What is meant by institution of an heir, and of the advantages arising therefrom,	- - - -	LAW 1
Who may be instituted heir to another,	- -	2
That the testator may, if he choose, institute his slave, as his heir,	- - - - -	3
Who cannot be instituted an heir,	- - - -	4
That a woman who intermarries before the lapse of one year after the death of her husband, cannot be instituted an heir,	- - - - -	5
By what words and in what manner an heir may be instituted,	- - - - -	6
That the institution of heir, ought to be made by will and not otherwise,	- - - - -	7
That when the heir is instituted as such, purely and simply in the will, he cannot be subjected to any condition contained in the codicil,	- - -	8

- When the testator declares that the heir mentioned
in the will, shall have such a part of his estate,
as he shall designate in his codicil, and none be
accordingly designated, whether the heir will
inherit the estate of the deceased, - - - - LAW 9
- That the testator ought expressly to declare or
write the name and surname of the person he
institutes as his heir, or designate him by cer-
tain marks, so that no doubt may arise in that
respect, - - - - 10
- That the testator himself ought to nominate the
person whom he institutes as his heir, and not
to leave it to the choice of another, - - - - 11
- That the institution of an heir, made through
error, is not valid, - - - - 12
- That the institution of heir may be valid, notwith-
standing the testator should not mention him by
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- If any one is instituted heir to a part of the estate
of the testator, he may inherit the whole, if the
testator institute no other heir, - - - - 14
- That the person instituted for heir, is not preju-
diced by any day or time specified in the will, 15
- In how many parts the testator may divide his es-
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estate ought to be divided among them, - - - - 17
- What portion each of the heirs will be entitled to,
when the testator divides his estate into more
than twelve parts, - - - - 18
- That the estate of the testator, may be divided
into a greater number than twelve parts, - - - - 19
- When the testator gives his estate to the poor of
any town, among whom it ought to be divided, 20
- What distinction exists between the heirs of the

testator, - - - - -	LAW 21
What time ought to be regarded in order to ascertain whether the heir can be instituted or not,	22
Where a slave belongs to several persons, in what manner one of them, may make him his heir,	23
That the master cannot institute all his slaves his heirs and emancipate them, when he has no other property with which to pay his debts, -	24
That where the master institutes his slave, as his heir, and afterwards sells him; in what case, the purchaser will be entitled to the estate of the testator, - - - - -	25

TITLE III.

How the heirs ought to be instituted by will.

LAW 1.

What is meant by the institution of heir, and of the advantages arising therefrom.

Heredem instituere in Latin, means in common speech, the institution of one man by another, for his heir, so that the latter becomes, after the death of the testator, the owner of the whole or a part of his estate, in the place of the testator himself. Great advantage hence arises to the testator, as he leaves his estate to the person of his choice, whereby his mind is consoled on departing this life. It is also advantageous to the heir, as his worldly estate is increased from the same cause. (1)

(1) C. art. 111, p. 232.

LAW 2.

Who may be instituted heir of another.

The emperor or empress, the king or queen, may be instituted heir to any one, as also may their respective treasuries (*camaras*), and the churches of every place consecrated to the worship of God and works of piety ; likewise a city, town, or a corporation, as well as military men, and every person whether father or son, whether he be of a sound mind, or a lunatic, deaf, dumb or blind, a prodigal, clergyman, layman or a monk. And in a word, we say, that every man who is free, and who is not prohibited by the laws of this book, may be instituted the heir of another person. (1)

LAW 4. (a)

Who cannot be instituted an heir.

We also say, that no fraternity or association (*ayuntamiento*) entered into contrary to law, or to the wish of the king or prince, shall be instituted as an heir, nor any person who is born of an unlawful union, as that of relations within the degrees prohibited by law. (1)

[No other part of this law in force.]

(1) *C* chap. 2, tit. 2, b. 3.

(a) The law preceding this is no longer in force, in as much as slaves are now declared incapable of receiving by donations *inter vivos* or *mortis causa*, unless previously enfranchized. *C.* art, 5, p. 208. For the head of that law, see the index of this title.

(1) *R.* ll. 6 & 7, tit. 8, b. 5.

LAW 5.

That a woman who marries before the lapse of one year, after the death of her husband, cannot be instituted an heir.

A woman who marries before the lapse of one year, after the death of her husband, cannot be instituted an heir, by any one who is not her relation within the fourth degree inclusively. And the law prohibits women from marrying, within that time, for two reasons: the first, that no doubt might arise which of the two husbands, the dead or the living, was the father of the child, if any happen to be born of the woman during that time; and the other is, that the second husband may not entertain any suspicion against her, for wishing to marry so soon. (1)

LAW 6.

By what words and in what manner an heir may be instituted.

The testator ought to name with certainty, the person whom he institutes as his heir, by saying: "I wish such a one, mentioning him by name, to be my heir to the whole or a part of my estate," as the testator thinks proper. And if he should say: "let such a one be heir;" these words would be effective, though he should not have said: "my heir." And we also say that if it should be written in the will: "that such a one heir;" the testator naming him, without saying: "may be;" or if it be written: "such a

(1) *R. l. 3, tit. 1, b. 5.—C. art. 31, p. 28.*

one may be ;” without adding the word : “ my or heir ;” the institution made in any of these ways, will be valid. For the ancient sages presumed that the testator had uttered all the words necessary for the institution of the heir, but that all of them had not been committed to writing ; or if he had not uttered them, it was on account of his sickness and for no other cause, in as much as the will is complete in all other respects. But if one only of these words should be written, as if the testator had said : “ such a one ;” or : “ heir ;” not mentioning him by name ; then the will would not be valid, in as much as a satisfactory presumption or understanding of the intention of the testator, cannot be derived from them. We finally say that the institution of heir, may likewise be made by other words, as if the testator should say : “ let such a one be my heir ;” or : “ I desire or order that he may be so ;” or if he should say : “ let such a one be the owner of all my estate ;” or : “ let him have all my property ;” or : “ I leave him all I have ;” or in any other similar words whatever ; by which the will of the testator, can be made to appear in this respect.

LAW 7.

The institution of heir ought to be made by will and not otherwise.

The institution of heir, ought to be made by a regular will, and not by another instrument of writing called in Latin *codicillus*. (1)

[No other part of this law in force.]

(1) C. art. 83 & 117, p. 226 & 232,—*ibid* art. 40, p. 216 & 218.

LAW 8.

That when the heir is instituted as such purely and simply in the will, he cannot be subjected to any condition contained in the codicil.

Where a man is instituted by the will of another, his heir, simply and without condition, he cannot be prejudiced by any condition contained in the codicil which the testator afterwards makes. (1)

[No other part of this law in force.]

LAW 9.

When the testator declares that the heir mentioned in the will, shall have such a part of his estate as he shall designate in his codicil, and none be accordingly designated, whether the heir will inherit the estate of the deceased.

Doubts may arise where the testator declares thus :
 “ I make such a one, my heir, for such portion of my estate as shall be designated in my codicil ;” if, however, when he afterwards makes his codicil, he should not specify the portion he gave to the heir he named in his will, and the heir then present himself and claim the estate of the testator : Now to remove all doubts in this respect, we say that though such portion be not specified in the codicil, the heir shall take the whole of the estate of the testator, except that which is given to some other persons. And if he institute two heirs in the manner above mentioned, they

(1) C. art. 83 & 116, p. 226 & 232.

will inherit his estate by equal parts. But if he should designate any particular portion in his codicil, he or they who are instituted his heirs, shall have that much and no more.

LAW 10.

That the testator ought expressly to declare or write the name and surname of the person he institutes as his heir, or designate him by certain marks, so that no doubt may arise in that respect.

Where the testator has two friends of the same name and wishes to make one of them his heir, he ought to designate him by his name, or that of his father, or by other marks, so that it can be known with certainty which of them he institutes : for if he do otherwise, the institution would not be valid, and his nearest relation will inherit his estate in the same manner as if he had died intestate. He ought, however, to designate his heir, in such a manner as neither to dishonour or defame him. For if he should say : “ I make such a one my heir, who has been condemned as a traitor by the king ;” or if he should say any other evil thing of him, by which he is dishonoured or defamed, the institution will not be valid. But if he should speak ill of him, in general terms by saying : “ I institute such a one my heir, though I know that he is wicked ;” and does not designate expressly what evil or offence he had committed ; such institution will be valid. And so we say it would be, if he should say : “ let my perverse (*malito*) son be my heir, though he never rendered me any service for which he deserves to be.” We also say that if a testator should declare : “ I in-

stitute for my heir, such a one of my brothers, naming them, who shall marry such a woman ;” then he who marries her accordingly, will be heir to the testator.

LAW 11.

That the testator himself ought to nominate the person whom he institutes as his heir, and not to leave it to the choice of another.

The testator himself ought to nominate the person whom he institutes as his heir. For if he give another person, the power to do it, in his place, it will not be valid ; as where he expresses himself in this manner ; “ let such a person be my heir, whom such a one wishes or institutes.” And the reason is that the institution of an heir, or the giving of a legacy, ought not to be left to the choice of another. But if any one solicit the testator to institute a person for heir whom he names, and the testator yield to his request and institute him accordingly, it will be valid. (1)

[No other part of this law in force.] (2)

LAW 12.

That the institution of an heir, made through error, is not valid.

If the testator err as to the person he makes his heir, believing that he institutes one person, while in fact, he institutes another ; such institution will not be va-

(1) R. ll. 5, 6 & 23, tit. 4, b. 6.

(2) C. art. 88, §. 226.

lid, as having been made through error : as where a man should wish to make any one his heir, who had been his master, and some other person, resembling him, present himself, and the testator believing him to be his master, say : “ I institute for heir him who was my master, who enfranchised me, and who is now in my presence.” For then neither his master whom he believed he instituted, would be his heir, because his name was not mentioned or written in the will, nor the other person who was present at the time of the institution, as the testator had erred in taking him for his master. And so it would be with respect to any thing the testator may bequeath by his will, given to one person through error, when he believed he was giving it to another, as is above said.

LAW 13.

That the institution of heir may be valid, notwithstanding the testator should not mention him by name, if it be otherwise certain whom he meant.

There sometimes exists between men such great friendship, that they love one another as brothers ; and one of them leaves his estate to the other, saying purposely : “ I institute my brother for my heir ;” such institution, we say, would be valid, notwithstanding he should not be his brother, and he is not to be considered as having called him so, through error, but on account of the great affection he had for him, in as much as he has left him all his estate. We also say that if the testator be certain as to the person he institutes his heir, or to whom he gives a legacy, the institution or

legacy will be valid, notwithstanding the testator may have erred as to the name or surname of the heir or legatee. For the truth cannot be prejudiced by error, as the person of the heir or legatee is certainly known.

LAW 15. (a)

That the person instituted for heir, is not prejudiced by any day or time specified in the will.

No man can make another his heir for a certain time ; as if he should say : “ I wish such a one to be my heir until such a day ;” or if he should say : “ let such a one be my heir forever, after such a time ;” the heir will nevertheless be entitled to the estate immediately, and will not be bound to wait until the time or day specified in the will. But a person may be instituted heir, for an uncertain time, as if the testator should say : “ I institute such a one for my heir, on the day of his death :” (b) such institution will be valid ; for though it is certain that a man must die, it is uncertain at what time.

[No other part of this law in force.]

(a) The preceding law is not in force. For its head, see the index of this title. See likewise C. art. 194, 195 & 196, p. 250.

(b) Ex præcedentibus patet quod intelligatur quando scilicet ipse hæres institutus morietur, &c. Gregorio Lopez.

LAW 16.

In how many parts the testator may divide his estate among his heirs.

The testator may divide his estate into as many parts as he pleases. But the ancient sages generally conceived that an estate ought to be divided into twelve parts, called *onças*.

[No other part of this law in force.]

LAW 17.

When there are several heirs, in what manner the estate ought to be divided among them.

Where the testator institutes for heirs, three or four persons conjointly, not designating what portion of his estate, he gives to each of them, they ought to inherit by equal portions. But if he intended to give one of them more than the others, he should declare what portion he gives to each of them ; then every one will be entitled to the part assigned to him and no more. And if he should institute certain heirs, assigning to each of them, the portion they should have, and should moreover institute another heir, without assigning him any portion : the first will take the shares assigned to them, and the other whose share had not been fixed, whether one or more, will have all the remainder of the estate, after payment of the debts and legacies. We also say that if the testator should institute four persons, as his heirs, by giving to one of them, the half of his estate, and the other half to another of them, without assigning any portion to the others : in

that case, the two whose shares have been fixed, shall inherit no more than the half of the estate, which they must divide equally between them. And the other two will inherit the other half, which they must divide in like manner, whether they have been instituted as heirs, in the commencement, the middle or the end of the will.

[No other part of this law in force.] (1)

LAW 18.

What portion each of the heirs will be entitled to, when the testator divides his estate into more than twelve parts (doze onças.)

The estate of the testator ought to be divided into twelve parts (*onças*) as we have above said ; but if he should divide it into a greater number, as if he should institute four heirs, giving to them, four parts each : in that case, we say it ought to be reduced to twelve parts only, deducting one part from the share of each heir, so that they may have three parts each.

[No other part of this law in force.] (2)

LAW 19.

That the estate of the testator, may be divided into a greater number than twelve parts.

Pondus in Latin, means in common speech, the twelve parts (*onças*) into which the estate of the tes-

(1) *C art. 194, 195 & 196, p. 250.*

(2) *C. art. 194, 195 & 196, p. 250.*

tator, ought to be divided. *Dipondium* is another Latin word which means twenty-four parts; and *tripondium*, thirty-six: and the testator may, if he please, divide his estate into as many parts, more or less, as are expressed by the above terms. We therefore say that when it is manifest that the testator intended to divide it into more than twelve parts, as if he should give to one heir twelve parts, and to the other six, and should not mention the other six which complete the *dipondium*: then the heir to whom he had given twelve parts, ought to take two thirds of the estate, leaving the remaining third to the other heir to whom the six parts have been given. (a) And so we say it would be when the testator had first given to one of his heirs, six parts, and had then given to the other, twelve. And if the testator institute three heirs, saying: "that he institute the first, the second and the third, each of them respectively heir to his whole estate;" in such case, it ought to be divided equally between them. We also say that if the testator institute any person, as heir to the whole of his estate, and afterwards institute another to the remaining part; then the first will be entitled to the whole of the estate, and the latter will take nothing. But if the person instituted to the whole, should be, by law, incapable of inheriting, and the testator afterwards institute another heir, declaring: "that he should be his heir to that part of the estate which the first could not inherit;" then the last will take the whole of it, and the other nothing, if he be incapable, as is above said.

(a) See the amendment by the civil code, art. 197, p. 250.

LAW 20.

When the testator gives his estate to the poor of any town, among whom ought it to be divided.

Where the testator declares: "I institute for my heirs, the poor of such city or town;" or: "I order that my estate shall be given to the poor, for the good of my soul: as doubts may arise who the poor are among whom the estate is to be divided, we will explain ourselves in this respect. And we say that it ought to be given and distributed among the poor in the hospitals of the city or town designated by the testator, and especially to those who are afflicted with such infirmities as to be unable to leave the hospitals to seek for alms; as the maimed, the lame, the blind, the foundlings who are reared there, and the aged, or those who are afflicted with such infirmities as to prevent them from walking and going out of the hospitals, as they are more in want of assistance than those who can ask for alms. And if the testator had not designated the city or town to the poor of which he intended to give his estate, then it shall be divided among the poor of the place where he makes his will.

LAW 21.

What distinction exists between the heirs of the testator.

There is a difference or distinction between heirs: for some are called heirs *proper* (*suyos*) to the testator, others *necessary*; and others again *strangers*. The *proper heirs* are the children, grand children and great grand children of the testator, if they should be under

his power at the time he makes them his heirs ; and the ancient sages called them his *proper heirs*, because they are, in a manner, one person and the same thing with the testator himself ; and because they were, moreover, said to be in some sort the owners of the estate, while living with their ancestors (*mayorales*) ; for during that time, they derive from their estates, whatever they stood in need of, in the same manner that their fathers or grandfathers themselves did ; and again because the latter, at their death, could not disinherit them, without a certain and legal cause. (a) And those heirs are called *strangers*, who are not of either of the forementioned sorts called *proper* or *necessary*.

[No other part of this law in force.]

LAW 22.

What time ought to be regarded in order to ascertain whether the heir can be instituted or not.

Though the heirs called *proper*, as those who descend from the testator, be incapable at the time of their institution, of being made heirs to other persons, yet if at the period of the father or grandfather's death, the impediments should not exist, they may inherit their estates. But with regard to those heirs called *strangers*, they must be such as are free from all personal impediments, at three different periods of time : first, when they are instituted heirs ; secondly, at the

(a) Slaves instituted heirs were called *necessary heirs*, a distinction no longer known to our laws. C. art. 5, p. 208.

time of the death of the testator ; and thirdly, when they accept of the estate. For if at either of these periods they labour under any of those impediments which prevent them from becoming heirs, they will not be entitled to the estate, and it will go to those who are instituted heirs conjointly with them ; and if there should be no others, then the estate will descend to the nearest relations of the deceased.

[No other part of this law in force.] (a)

LAW 24. (b)

That the master cannot institute all his slaves for heirs and set them free, when he has no other property with which to pay his debts.

Where a man is indebted to several persons, or is bound to give or to do any thing for them, if the whole or the greater part of his estate, consists of slaves and he should wish to enfranchise them, he cannot do it, in fraud of his creditors. (1)

[No other part of this law in force.] (c)

(a) C. art. 5, p. 208.

(b) The law which precedes this, as well as that which follows it, are not in force, as both relate to the institution of slaves as heirs. For their heads, see the index of this title.

(1) C. art. 7, p. 42.

(c) C. art. 5, p. 208.

TITLES

Of the Roman and Spanish Laws which relate to the title
of **LAS SIETE PARTIDAS**, on the conditions that may
be annexed to the institution of heir. (a)

OF CONDITIONS THAT MAY BE ANNEXED TO THE INSTITUTION OF HEIR BY WILL.

What is meant by condition ; how many kinds there are, and in what manner they are imposed,	LAW 1
In what manner the conditions which relate to the time past, present and to come, ought to be im- posed upon the institution of heir, - - - -	2
Of conditions that are naturally or legally impos- sible, - - - - -	3
Of the condition which is impossible in fact, - -	4
Of doubtful and uncertain conditions, - - - -	5
Where the testator institutes any one for heir, under the condition that the latter swear he would do a certain thing : whether or not the heir would be entitled to the estate, although he should not swear accordingly, - - - - -	6
That the conditions contained in a will, ought to be accomplished, - - - - -	7
When the condition annexed to the institution of heir, is of such a nature as not to be accom- plished by man, the heir cannot take the estate until the happening of the condition, - - - -	8
Of the conditions depending partly upon the pow- er of men, and partly upon events, called mixed conditions, - - - - -	9

(a) There are no titles in the Roman and Spanish laws correspond-
ing to this title.

What are the conditions which are understood in the institution of heir, though not expressed, and which are called in Latin <i>tacitas</i> , - - -	LAW 10
That the father shall not impose any condition upon the legal portion which he leaves to his child, - - - - -	11
That he who is instituted heir unconditionally, may enter upon the estate, notwithstanding the condition imposed upon his co-heir, should not be accomplished, - - - - -	12
How conditions annexed to the institution of heir, whether they be joint or separate, ought to be accomplished, - - - - -	13
That the heir ought to have the estate, if it should not be in his power to comply with the condition under which he was instituted, - - - - -	14
In what manner the condition ought to be accomplished, which is imposed by will, upon a person who is in the power of another, - - - - -	15
In what case the institution of heir is valid, when the condition annexed is accomplished in fact, though it could not be in law, - - - - -	16

TITLE IV.

Of the conditions that may be annexed to the institution of heir by will.

LAW 1.

What is meant by conditions ; how many kinds there are, and in what manner they are imposed.

Conditio is are clauses which testators usually annex to their wills, in order to suspend the effect of the in-

stitution of heir or legacies therein contained, until such conditions shall be accomplished. They are sometimes annexed in express words, and at others tacitly understood, though not contained in the will. And with respect to those that are expressed, there are some that relate to the time past, others to the present, and others again to the time to come. With respect to those that relate to time to come, there are some that may and others that cannot happen, and which the Romans called *impossible*. Among the latter some are naturally impossible; others are so by the operation of law; others in fact; and others because they are doubtful and obscure. With respect to those that are possible, there are some that depend upon the power of man for their accomplishment, and others upon an uncertain event. And there are others again that are mixed, which depend partly upon the power of men and partly upon an uncertain event. And conditions are annexed to the institution of heir, where the testator declares: "I make such a one my heir, if he give or do such a thing for such a one;" or in any other similar manner.

LAW 2.

In what manner the conditions which relate to the time past, present and to come, ought to be imposed upon the institution of heir.

Where a man imposes a condition to the institution of heir, relative to the time past or present, if the thing to which the condition relates, exist, the institution is valid as soon as made; as where the testator says: "I

make such a one my heir, if the king shall have appointed such a one governor (*adelantado*);” or if he should say : “ I make such a one my heir, if such a person be now living.” But such a condition as this, which relates to the time past or present, is not a condition properly speaking ; as the thing to which it relates, is not doubtful. For it either exists or does not, although its existence may be doubtful to the testator who is ignorant of it. But that which relates to the time to come, is properly called a condition, in as much as it is uncertain whether it will be accomplished or not ; as where the testator should say : “ I make such a one my heir, in case such a one should be appointed bishop of such a church ;” for it is uncertain whether he will be so appointed or not. And conditions may be annexed to the institution of heir, in the manner above mentioned, and in others similar thereto or in any other way.

LAW 3.

Of conditions that are naturally or legally impossible.

Among the conditions which men annex to the institution of heir, and which relate to the time to come, there are some that are naturally impossible ; as if the testator should say to any one : “ I make you my heir, provided you touch the heavens with your hand.” Such conditions will not invalidate the institution of heir, although it cannot be accomplished ; but the institution will, on the contrary, be as valid as if no condition had been annexed. And so it would be with respect to legacies given by the testator, subject to

such or similar conditions. We moreover say, that when conditions impossible in law, are annexed to the institution of heir or legacies, they will not prejudice the heir, though they should not be accomplished ; as when the testator says to any one : “ I institute you for my heir, provided you do not redeem your father from captivity, or do not furnish him with food.” Such condition would not be valid, and though it should not be observed by the heir, he would nevertheless take the estate or the legacy. And generally all those conditions are called impossible in law, which are repugnant to the duty (*honestad*) of the person upon whom they are imposed, and contrary to good morals or adverse to piety or natural law.

LAW 4.

Of the condition which is impossible in fact.

Men sometimes annex to their wills, conditions which are called impossible in fact ; as where the testator says : “ I appoint such a one my heir, provided he should give a mountain of gold to such a church.” This institution would not be valid, because it is subject to a condition that cannot be accomplished. Wherefore we say, that the heir will not be entitled to the estate left him under such a condition.

[No other part of this law in force.]

LAW 5.

Of doubtful and uncertain conditions.

There are other conditions that are uncertain and doubtful, called in Latin *perplexas* ; as if the testator

should say : “ I institute such a one for my heir, if such another one be my heir, and if this last should be my heir, then I make the first mentioned person, my heir.” Such institution would not be valid, in as much as it is impossible that each of these persons, should begin to be heir before the other ; which, however, would be necessary in order that the condition may be complied with.

LAW 6.

Where the testator institutes any one for heir, under the condition that the latter swear he would do a certain thing : whether or not the heir would be entitled to the estate, although he should not swear accordingly.

Where the testator institutes any person for heir, under condition that he shall swear that he will give so many maravadis or such a vineyard or other similar thing to such a one, such condition, so far as it relates to the oath, ought to be considered as not written, in as much as it concerns things to come, called in Latin *de futuro* ; (a) but the heir will not be entitled to take the estate of the deceased, until he shall have given or done the thing which the testator required him to swear he would give or perform. And this rule obtains with respect to legacies in the same manner as it does in the institution of heir.

[No other part of this law in force.]

(a) It would seem that no person can be compelled to take an oath which is not exacted by law.

LAW 7.

That the possible condition contained in a will, ought to be accomplished.

By *possibiles conditiones* in Latin, are meant those conditions which it is in the power of men to accomplish; as if the testator should say: "I wish such a one to be my heir, provided he build a church or a hospital in such a place;" I institute such a one, for my heir, if he abstain from doing such a thing," expressly mentioning what thing; or "I make such a one my heir, provided he give one hundred maravadis to such a church, or if he should not give such a castle to such a one. And the institution of heir made under such a condition, will be valid, if it be accomplished, but the person instituted heir under condition not to do a determinate thing, ought to give sufficient security that he will accordingly abstain from doing it; and if he be unwilling to give the security, he will not be entitled to take the estate. (a)

LAW 8.

When the condition annexed to the institution of heir, is of such a nature as not to be accomplished by man, the heir cannot take the estate, until the happening of the condition.

Those are called contingent conditions which it is not in the power of man to accomplish, but which may happen in the course of events; as if the testator should

(a) Si tamen non potest præstari cautio cum fidejussore, propter paupertatem, videtur sufficere cautio juratoria. Gregorio Lopez.

say : “ I institute such a one for my heir, if it should rain to-morrow, or the sun should shine or the day be clear and free from clouds :” under such or similar conditions, whether they relate to a longer or shorter time, the heir cannot take the estate, before their accomplishment. But there are contingent conditions of such a nature that they do not prevent the effect of the institution of heir, as if the testator should say : “ I institute such a one for my heir, if the sun rise to-morrow ; or if he should die,” not designating within what time. And this because such conditions as these, are so certain that they cannot but happen : And therefore as soon as they are annexed, the institution of heir would have effect, without being impeded or procrastinated thereby.

LAW 9.

Of conditions depending partly upon the power of men and partly upon events, called mixed conditions.

They are called mixed conditions which depend partly upon the power of men and partly upon events ; as if the testator should say : “ I institute such a one for my heir, provided he return from beyond the seas and dwell in this country.” Such condition would depend partly upon the heir, because he may take his passage in a ship to return ; and partly on events, for after he had taken his passage, an accident may happen to him in returning ; and if the heir instituted under such a condition, be a descendant of the testator, the institution will be valid, notwithstanding the condition be not accomplished ; but if he be a stranger, it

would not be valid, unless the condition were accomplished.

LAW 10.

What are the conditions which are understood in the institution of heir, though not expressed, and which are called in Latin tacitas.

By *tacita conditione* in Latin, is meant in common speech a tacit condition, that is a condition of such a nature that, though it be not formally expressed, yet in law, is understood to be so; as if the testator should have two children either legitimate or natural, and he should declare in his will; "that in case one of them should die the other should inherit his estate." Yet if the deceased should leave children, they would inherit their father's estate, and not their uncle who had been instituted heir by the testator. And the reason is that it is always presumed in law, that although the testator had not expressly so declared, yet his intention was, that in case one of his sons should die, leaving children, his estate should be inherited by these children and not by his surviving son. (a)

[No other part of this law in force.]

LAW 11.

That the father shall not impose any condition upon the legal portion (la legitima) which he leaves to his child.

The son ought to have his legal portion (*su legitima parte*) of the estates of his father and mother,

(a) The example here given has been preserved for the better understanding of the law, substitutions being no longer known to our code.

free of all incumbrances or conditions whatsoever, according to what we have said in the title of wills. But if the father wish to give his son, more than his legal portion, he may annex such condition to the overplus, as will be in the power of the son to accomplish. But he cannot annex any of those conditions which depend upon uncertain events, or that are mixed, as is said in the preceding laws, and if he should annex any such, they will not prejudice the heir, though they should not be accomplished. (1)

LAW 12.

That he who is instituted heir unconditionally, may enter upon the estate, notwithstanding the condition imposed upon his co-heir, should not be accomplished.

If the testator institute two persons for heirs, the one subject to a possible condition, and the other, simply and unconditionally ; the latter may immediately after the death of the testator, enter upon the portion of the estate, to which he is instituted heir ; but the other who is instituted under condition, cannot enter upon his portion, until such condition be accomplished.

LAW 13.

How conditions annexed to the institution of heir, whether they be joint or separate, should be accomplished.

Testators sometimes annex to the institution of heir, conditions, some of which are joint and others sepa-

(1) *R. l. 1, tit. 8, b. 5.*

rate : jointly, as where the testator says : “ I make such a one my heir, provided he build such a church or such a hospital, and give so many maravadis to the poor.” When he annexes such, or similar conditions jointly, the heir ought to comply with them in every respect, in order that the institution may be valid ; these conditions are joined together by the word *and*. Conditions may be also separately annexed by the testator saying : “ I institute such a one my heir, provided he give one hundred maravadis, for the benefit of my soul ; or build such a church or monastery.” In such case, we say that it shall be sufficient for the validity of the institution, that the heir should accomplish either of the conditions. They are made separate by the word *or*. We likewise say, that if the testator impose one condition upon several persons whom he institutes his heirs, it shall be sufficient for the validity of the institution, that one only of them should comply with the condition, although the others should not.

[No other part of this law in force.]

LAW 14.

That the heir ought to have the estate, if it should not be in his power to comply with the condition under which he was instituted.

We say that if the condition under which the legacy is given, or the heir instituted, be such as is in the power of the person on whom it is imposed to perform, and he should be prevented therefrom by accident, the institution or legacy will nevertheless remain valid ; as where the testator should say : “ I institute such a

one for my heir, or bequeath him such a thing, provided he emancipates such a slave belonging to him." If in that case, the heir or legatee desired to comply with the testator's wish, but should be prevented from doing it, without his fault, by any accident happening to the slave, as by his death or by his loss in any other manner, the institution or legacy will not be prejudiced thereby. But if the testator should say: "I bequeath one hundred maravadis to such a woman, or I make her my heir, provided she intermarry with such a man;" in that case, if either the woman or man should happen to die before the condition be accomplished, the institution or legacy will not be valid. But if the woman should be willing to comply with the testator's wish, and the other refuse; then she will take the estate or the legacy, and this refusal will not prejudice her, in any manner. If on the contrary, she refuse to comply with the condition, by marrying the man designated by the testator, then she will not be entitled either to the estate or legacy: unless the person with whom she was required to intermarry, should be her relation, or a man to whom she could not be legally married.

LAW 15.

In what manner the condition ought to be accomplished, which is imposed by will, upon a person who is in the power of another.

But if any other free person who is a minor, under twenty-five years of age, and under the guardianship of another, should be instituted heir, under any condition, he may comply with the same, without the

authority of his guardian, whereby he will be entitled to the estate or legacy.

[No other part of this law in force.] (a)

LAW 16.

In what case the institution of heir is valid when the condition annexed is accomplished in fact, though it could not be in law.

There are conditions which may be accomplished in fact, though not in law; as where the testator says: I institute such a one for my heir, provided he emancipate such a slave belonging to me." For although the heir cannot legally emancipate a slave belonging to another person, if nevertheless he do what he can and procure him his freedom, he will be then entitled to the estate of the testator, in as much as the slave would be free in fact.

TITLE V.

How heirs may be established by wills, in room of others first instituted therein, and who are called in Latin substitutos. (b)

[Not in force.]

(a) C. art. 5, p. 208.

(b) Substitutions have been abrogated by the civil code, as well as *fidei commissa*. C. art. 4, p. 216.

TITLES

Of the Roman Laws, and of the Civil Code, which relate to that of LAS SIETE PARTIDAS, which treats of the time taken by heirs to deliberate, &c.

Digest lib. 28. tit. 8. - - *De jure deliberandi.*

Novels Col. 9. tit. 4. - - *Ut deliberandi jus etiam ad impuberes transmittatur.*

Domat's Civil Law, part 2. b. 1. tit. 2. sect. 1. 2 & 3.

Civil Code b. 3. tit. 1. chap. 6. sect. 2.

OF THE TIME TAKEN TO DELIBERATE, &c.

- What is meant by the time which the heir ought to have to deliberate whether he will accept the estate or not ; what advantage arises therefrom, and who can or cannot claim the same, - - - **LAW 1**
- How long a time ought to be granted to the heirs, for deliberation, as is above said, - - - - - **2**
- That during the time taken by the heir to deliberate, he can neither sell nor alienate any thing of the estate, - - - - - **3**
- That the heir who takes time to deliberate, ought to return the estate to those who are entitled to it, if he should not choose to accept it himself, **4**
- That if the heir be unwilling to take time to deliberate, he must have the precaution not to enter upon the estate of the deceased, before he had made an inventory of the same, - - - - - **5**
- That the creditors or legatees of the deceased, who did not attend at the making of the inventory, may inquire and ascertain whether or not it contains an account of the whole estate, - - **6**

That while the heir is making the inventory, the legatees cannot bring suit against him : of the effects of the inventory, and what advantages the heir derives therefrom, - - - - -	LAW 7
What are the expenses that the heir is not bound to mention in the inventory, - - - - -	8
What penalty ought to be inflicted upon the heir who makes a fraudulent inventory, - - - - -	9
That the heir will be bound to pay the whole of the legacies and debts of the deceased, if he fail to make an inventory within the time prescribed, - - - - -	10
In what manner the heir ought to accept of the estate, if he think it will be to his advantage to do so, - - - - -	11
That the son may, by certain acts, make himself heir to his father's estate, without any express declaration to that effect, - - - - -	12
Who they are who being instituted heirs, may, of their own authority, take and acquire the estate, and who they are that must be authorized by other persons to that effect, - - - - -	13
That the heir ought to be certain of the death of the testator, before he enters upon his estate, and whether or not the testator were capable of instituting him his heir, - - - - -	14
That the heir himself ought to accept of the estate simply and unconditionally, and not by the intervention of another person, - - - - -	15
Where a man dies intestate, leaving his wife pregnant, his relations cannot enter upon his estate, until it be known with certainty, whether she be pregnant or not, - - - - -	16
What precautions the relations of the deceased, may take when his wife says that she is pregnant by him, - - - - -	17

- That the heir may renounce the estate left to him
by will, or which he inherits by reason of his
relationship to the deceased, - - - - - LAW 18
- That if he who is instituted heir, by one who was
his relation, renounce the estate under the will,
he cannot claim it in virtue of his relationship, 19
- Within what time the son or grand-son may re-
claim an estate which he had renounced, - - - 20

TITLE VI.

That the heirs may have a certain time (plazo) to deliberate whether or not they will accept an estate to which they have been instituted heirs; and how the inventory ought to be made. Likewise how the wife ought to be guarded after the death of her husband, when it is alleged that she is pregnant by him.

LAW 1.

What is meant by the time which the heir ought to have to deliberate, whether he accept the estate or not; what advantage arises therefrom, and who can or cannot claim the same.

Deliberare in Latin, means in common speech, the act of consulting ourselves or friends, whether it is advantageous to do the thing concerning which time (*plazo*) is taken to deliberate. Such deliberation is greatly advantageous to those who are instituted heirs by will; and likewise to those who have a right to inherit of a person dying intestate by reason of their relationship to him; for by that means they can determine

whether they will derive profit, or sustain loss by accepting the estate. The heirs ought to ask such time of the judge of the place where the greater part of the estate of the deceased is situated, before they consent to become heirs, either expressly or tacitly. They may likewise petition the judge to cause the papers and documents appertaining to the estate, to be exhibited to them, that they may be the better enabled to form their opinion ; and these things may be petitioned for by the heirs, whether there be one or more of them. Moreover, when either of the heirs is a minor under twenty-five years of age, he cannot himself ask for time to deliberate, but it ought to be done by his guardian in his behalf. (1)

LAW 2.

How long a time ought to be granted to the heirs for deliberation, as is above said.

Judges cannot grant a longer time for deliberation than nine months, and if they think that the heirs can determine in less time, they may diminish the term to not less than one hundred days ; (a) and if one of the heirs happen to die before the expiration of the term, his heir ought to be allowed the remainder to deliberate in : but if he should die after the expiration of the term, without having consented to accept of the heirship, and were not related to the deceased (*era extraño*),

(1) *C. art. 95, 98, p. 164.*

(a) See the civil code, art. 99, p. 166.

then his heir would have no right to the estate concerning which he had taken time to consider. Yet if he had descended in a right line from the testator by whom he was instituted heir, then his heir may take the estate, notwithstanding he had died after the expiration of the time granted for deliberating. (1)

LAW 3.

That during the time taken by the heir to deliberate, he can neither sell nor alienate any thing of the estate.

The heir can neither sell nor alienate any thing belonging to the estate of the testator, during the time allowed him for deliberating; unless he should do it by order of the judge for some legal cause: as if he should order him to sell any thing, to enable him to pay for interring the deceased, or for supporting his family, or for repairing or building the houses, or for cultivating the estate, if he should think it necessary, or to prevent its deterioration: or where he was bound to pay a debt on a certain day, or else incur a penalty; or if he should have any other thing to do, from the omission of which, any loss or damage might befall the heirs who were to inherit the estate. (2)

(1) C. art. 99, 100, 101, 102, *fi.* 176.

(2) C. art. 105, *fi.* 168.

LAW 4.

That the heir who takes time to deliberate, ought to return the estate to those who are entitled to it, if he should not choose to accept it himself.

If he who is instituted heir to an estate, take time to deliberate whether he will accept it or not, and then decline accepting it, he is bound to return it to the creditors of the deceased, or to those who are entitled to it. And if he should not be disposed to deliver it up accordingly, then they who are entitled to it, shall be believed under oath as to its value, the same having been previously fixed at the discretion of the judge. (1)

LAW 5.

That if the heir be unwilling to take time to deliberate, he must have the precaution not to enter upon the estate of the deceased, before he had made an inventory of the same.

By *inventarium* [in Latin, is meant in common speech, a writing containing a description of the estate of a person deceased. It is made by the heirs in order that they may not, afterwards, be compelled to pay the debts of the deceased, except to the amount of the estate they inherit from him. They ought to begin the inventory within thirty days from the time they knew they were heirs and finish it within three months. But if the whole of the effects of the deceased, should not be in one place, then the heirs may be allowed a delay of one year, in addition to the three months, that

(1) C. art. 10, p. 146.—art. 115, p. 170.

they may discover and make an inventory of them. And the manner in which it is to be made, is as follows : it must be drawn up by a notary public ; all the legatees of the testator having been called, that they may be present when it is made. And if some of the legatees should not be in the place, or unwilling to come, when called, then the inventory ought to be made before three witnesses, respectable men, who are acquainted with the heirs. And the notary ought to write in the inventory, a description of all the property of the deceased. After which the heir ought to write with his own hand, “ that all the effects of the testator, are faithfully set forth in the inventory, and that he has committed no fraud therein ;” and if he should not know how to write, he ought to ask one of the notaries public to do it for him before two witnesses. (1)

[No other part of this law in force.]

LAW 6.

That the creditors or legatees of the deceased, who did not attend at the making of the inventory, may inquire and ascertain whether or not it contains an account of the whole estate.

By *legatarios* in Latin, is meant those to whom the testator bequeaths something by will. And if they should not be present when the inventory is made, and suspect that all the property of the testator, was not mentioned in it, they may, in order to discover the truth, require the heir to swear that he has neither concealed any thing, nor committed any fraud in the in-

(1) C. art. 98, 99, 100 & 101, p. 166.

ventory. They may likewise require the witnesses who were present when it was made, to declare whether or not it were well and faithfully executed. And by this means, they may discover if the inventory had been faithfully made by the heir. And this investigation shall be made by the judge of the place, at the request of the legatees.

[No other part of this law in force.]

LAW 7.

That while the heir is making the inventory, the legatees cannot bring suit against him; of the effects of the inventory, and what advantages the heir derives from it.

During the time which the law allows to the heir, for making the inventory, the legatees cannot bring any suit against him, until the time has expired: this is one of the effects of the inventory. Nevertheless during such time, they who have any right upon the estate, will not be prejudiced on that account. Another effect of the inventory is, that after it is completed, the heir will not be responsible to the creditors and legatees of the deceased, except for the amount of his estate, as described in the inventory. We also say that the heir who has made an inventory, in the manner above mentioned, will not be bound to pay the legacies specified in the will, until he shall have previously paid the debts due from the deceased. (1)

(1) C. art. 97, p. 166.—*ibid* art. 111, p. 170.—*ibid* art. 236, p. 203.

LAW 8.

What are the expenses that the heir is not bound to mention in the inventory.

The heir is not bound to mention in the inventory, the expenses incurred in burying the deceased or those legally made in any other way ; but if a dispute should arise concerning them, he must prove the same, either by the witnesses who knew that he incurred them, or by his own oath. And if the heir himself have any claim against the estate, or were a creditor of the testator, he will preserve his rights entire, if he should make an inventory, in the manner above mentioned. (1)

LAW 9.

What penalty ought to be inflicted upon the heir who makes a fraudulent inventory.

If the heir make a fraudulent inventory, by concealing or stealing any part of the testator's estate, and the fact be proved, he shall pay double the amount of what he had concealed or stolen, to those entitled to receive any part of the succession. (2)

[No other part of this law in force.]

(1) C. art. 114, §. 170.

(2) C. art. 117, §. 170.

LAW 10.

That the heir will be bound to pay the whole of the legacies and debts of the deceased, if he fail to make an inventory within the time prescribed.

If the heir who has entered upon the estate of the deceased, should fail to make the inventory, within the time above mentioned, then all his property, as well that which he derives from other sources, as that which he inherits from the testator, will be bound for the entire payment of the debts and legacies of the testator. (1)

[No other part of this law in force.]

LAW 11.

In what manner the heir ought to accept of the estate, if he think it will be to his advantage to do so.

After the heir has deliberated and determined to accept of an estate to which he had been appointed heir, or which belongs to him by relationship, he ought to declare his acceptance expressly and assume the quality of heir. And such acceptance may be likewise inferred from his acts, without any express declaration to that effect: as if he should make use of the estate, as heir and owner, by cultivating or leasing it, or gathering its fruits, or using it in any other similar way. For by these or other like means, he may manifest his desire of becoming heir, and will, therefore, be bound to do and observe all things incumbent on an heir.

(1) C. art. 86, p. 164.—*ibid* art. 97 & 98, p. 166.

And this rule applies not only to a person who is instituted heir, but also to any one who inherits from another who died intestate. But if any one who has the right to inherit the estate of the deceased, should make use of it, through motives of piety and not with an intention of becoming heir : as where he administers relief to the sick slaves of the testator ; or furnishes them with nourishment, or other things of which they stand in need ; or should take care of his estate and effects, to prevent their loss or deterioration : by such acts as these, we say that he would not manifest his intention of becoming heir. But in order that no doubt may arise, whether or not he does these things with an intention of becoming heir, he ought distinctly to declare in presence of witnesses, that he is actuated by motives of piety, and not by a wish of becoming heir. (1)

LAW 12.

That the son may, by certain acts, make himself heir to his father's estate, without any express declaration to that effect.

If the son, under the belief that his deceased father's estate is encumbered with debts, be unwilling to accept of it, but should fraudulently purchase it, by the intervention of a third person, or convey away, or steal any thing belonging to the estate ; in that case we say, that he shall be presumed to have accepted of the succession, so that he will be bound thereby, and cannot afterwards renounce it, if any of these facts be proved.

(1) C. art. 75, 76, 77 & 78, p. 162.

This provision of law applies both to the son and the other heirs who descend in the direct line from the deceased, and who were under his power at the time of his death, but does not apply to the heirs who are called strangers, and who do not descend in the direct line from the deceased. For although one of these last should act in the manner above mentioned, he will not be bound thereby to accept of the estate, but he may be compelled to restore what he had taken, as a thing obtained by theft. (1)

LAW 13.

Who they are that being instituted heirs, may, of their own authority, take and acquire the estate ; and who they are who must be authorized by other persons to that effect.

Every one who is not a slave or a lunatic, or who is above twenty-five years of age, may enter upon and acquire an estate which belongs to him, either by will, or in any other legal way, as soon as he is informed of the death of the person from whom he inherits. But if he should be a madman or a lunatic, or a minor under seven years of age, he cannot, of his own authority, take and acquire the succession ; but they who have him under their guardianship, may enter upon it in his name, if they think it is to his advantage to do so. But if a minor under seven years of age, who is instituted heir to another, should be under the power of his father, the latter may enter the estate, in the name of his child. And if the minor happen to die, before

(1) C. art. 93, p. 164.

he is seven years of age and before his father had entered upon the estate, nevertheless the father may take possession of and acquire the estate for himself, and this because it had already vested in the son. We also say that no minor under fourteen years of age and who is in the power or guardianship of any one, can enter upon and acquire an estate to which he had been instituted heir, without the consent of his father or guardian. And if he should not be under the power of any one, he cannot acquire the estate, without the authorization of the judge of the place. But if the person instituted heir, be a minor under twenty-five years of age and above fourteen, and not under the guardianship of any one, he may then, of his own authority, enter upon and acquire the estate. But if after he had taken possession of it, he should discover that it was not to his advantage to retain it, he may change his mind and abandon it. And this he may do, by way of restitution, in as much as he was not twenty-five years of age complete, when he took the estate. (1)

[No other part of this law in force.]

LAW 14.

That the heir ought to be certain of the death of the testator, before he enters upon his estate, and whether or not the testator were capable of instituting him his heir.

He who is instituted heir of another, or who has a right by relationship, to inherit his estate, ought to be certain of his death: for as long as he is in doubt in

(1) C. art. 42, 43, p. 70.—*ibid* art. 82, p. 74.—*ibid* art. 22, p. 80.

this respect, he cannot either enter upon and acquire his estate or renounce it, though he should be disposed to do so. So likewise he who is instituted heir, under any condition, cannot enter upon the estate, or renounce the succession, until the condition shall be accomplished. We also say, that every person who is instituted heir, ought to be certain, whether or not the testator had a right to make a will. For if he be a person prohibited from doing it, by the laws of this book, the heir cannot enter upon his estate, and though he should do so, he would not acquire any right to the same. But if the heir should doubt as to his own situation, and whether or not he had the right of himself, to acquire the estate, he will not be prejudiced thereby: as where he had doubts whether or not he had ceased to be under the power of his father, or whether he were a slave or a freedman. For notwithstanding his doubts in these and similar cases, he may nevertheless enter upon and acquire the estate; in as much as it is certain that the will is valid and that the testator had the right to make it.

LAW 15.

That the heir himself ought to accept of the estate simply and unconditionally, and not by the intervention of another person.

Where a man is instituted heir to a certain portion of a succession, not knowing what portion, he may enter upon the estate, provided he do it, on his declaring that he takes it for the portion for which he is instituted heir. And this he must do simply

and unconditionally ; for if he annex any condition to it ; as if he should say : “ I wish to enter upon the estate of such a one who has made me his heir, under condition that if I find his estate to be profitable to me, I will accept it ;” or if he should say : “ I will be his heir until such a time ;” or should annex any other similar condition, at the time he enters upon the estate, such acceptance would not be valid, nor would he acquire the succession thereby.

[No other part of this law in force.] (a)

LAW 16.

Where a man dies intestate, leaving his wife pregnant, his relations cannot enter upon his estate, until it be known with certainty, whether she is pregnant or not.

We say that where a man dies intestate, leaving his wife pregnant, or believing her to be so, neither his brother nor other relations can enter immediately upon his estate, but must wait until the child is born. And if it be born living, whether a son or a daughter, it will inherit the estate of the father. But if it be known with certainty that the wife is not pregnant, then the nearest relation of the deceased, may enter upon his estate as his heir, on paying the debts and doing whatever else the deceased was bound to give or to do, after having obtained the authorization of the judge of the place to that effect. (1)

(a) C. art. 10, p. 422.

(1) C. art. 7, p. 9.

LAW 17.

What precautions the relations of the deceased may take, when his wife says that she is pregnant by him.

There may be women who, on the death of their husbands, declare that they are pregnant by them; and it may happen that, when men die leaving great estates, such women may endeavour to commit fraud in their offspring, by exhibiting the children of other persons and saying they were their own; the ancient sages have therefore prescribed a certain method by which such practices may be guarded against. And they say that whenever a woman declares that she is pregnant by her deceased husband, she ought to make it known to his nearest relations, twice each month from the death of her husband, until they send to examine whether she be pregnant or not. And if they doubt of the fact, they may send five good women (*buenas mugeres*), of free condition, to examine her person (*el vientre de la muger*), so as not to touch her against her will; they may also appoint some persons to guard her, if they think proper. And this must be done in the following manner: the judge of the place shall, if the relations require it, select the house of some good, honest matron (*duena*), in which she shall reside until she brings forth. And while dwelling there, she ought to inform the relations of the deceased, thirty days beforehand of the time at which she thinks she will be delivered of the child, in order that they may send good and honest women to examine her person again (*su vientre.*)

And in the house where she is to bring forth, there should be but one entrance, and if there be more, they ought to be closed ; and the relations of the deceased may, in order the more effectually to guard her, place at the door of the house three men and three women of free condition, who may be respectively assisted by two persons of both sexes. And every time she goes out of one house to another, within the limits of her residence, either to bathe herself or for any other thing of which she stands in need, her guardians ought to examine the house or place in which she wishes to bathe, in order to see whether any other pregnant woman or child be not hidden there, or any thing else wherewith some fraud may be practised. And when any person wishes to enter the house where she is, he or she ought to be examined, in such way as to prevent the commission of any fraud. We also say that when the widow feels symptoms of approaching parturition, she ought to inform the relations thereof, in order that they may again send to examine and guard her, if they think proper ; and when she is in the pains of childbed, no man ought to stay in the house where she is ; but there may remain with her, as many as ten women of free condition, six servants, none of whom should be pregnant, and two midwives. And there should be moreover three lights in the house, during every night until her delivery, in order that no fraud may be secretly committed. And when the child is born, it ought to be shewn to the relations of the deceased, if they wish to see it. And if all these things be observed, with respect to a woman whose pregnancy was doubtful, the child born of her after the death of

her husband, will inherit his estate. And if a widow, such as herein described, whose pregnancy was doubtful, should be unwilling to permit her person to be examined, or guarded in the manner above prescribed, or in any other proper manner, such as is customary in the place where she lives, the child born of her, though it should be living, will not be put into possession of the estate of the deceased, unless it should be proved that it was born of her, and within such a time that it might be the offspring of her husband. (1)

LAW 13.

That the heir may renounce the estate left to him by will, or which he inherits by reason of his relationship to the deceased.

The heir may renounce the estate in two ways: the one expressly and the other by his acts; expressly, as where he says, before entering upon the estate, "that he does not intend to accept it;" by his acts, when he enters into any agreement or contract, or does any thing concerning the estate, not as heir but as a stranger, or as a person who wishes to obtain it, in some other way than as heir; or if he should do any thing else respecting the estate, from which it can be inferred that he did not intend to take it, as heir. We also say that if the heir renounce the estate which belongs to him, either by will, or by reason of his relationship to the deceased, he cannot afterwards claim and recover it, unless he were a minor under twenty-five years of age. For

(1) *C. art. 49, p. 20.*

then, if he should discover that he had renounced it to his prejudice, he may afterwards claim and recover it, by reason of his non-age, at the time of the renunciation. We also say that he who has once accepted of the estate of another, cannot afterwards renounce it, (1)

[No other part of this law in force.] (a)

LAW 19.

That if he who is instituted heir, by one who was his relation, renounce the estate under the will, he cannot claim it in virtue of his relationship.

Where any one is instituted heir by will, as the nearest relation to the deceased, and knowing that he was so instituted, should renounce the estate, saying: "that he was not willing to take it, as the relation of the deceased;" if he should not then immediately accept the succession under the will, he could not do it afterwards, in as much as it will be presumed that he had abandoned the whole. But if, being ignorant that he had been instituted heir by the will of the deceased, he renounce the estate, saying: "that he did not wish to acquire it, as the nearest relation of the deceased," he may afterwards claim it, in virtue of the will, as he could not renounce a right under a will of which he had no knowledge. And we also say that he cannot renounce the right he has to the estate, in virtue of his relationship, unless he first renounce the right he had under the will: wherefore such renunciation will

(1) C art. 88, 89, 90, 92 & 95, p. 164.

(a) C, art. 194, 195, 196, p. 250.

not prejudice him, if he should wish afterwards to take the estate.

LAW 12.

Within what time the son or grandson may claim an estate which he had renounced.

Where the son or grandson who is above twenty-five years of age, renounces the estate of his deceased father or grandfather; he may claim and recover it, within three years thereafter, if it should not be alienated; but when once alienated, he cannot either claim nor recover it, unless he were under age, as we have above said.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
Disinherison.

Digest lib. 28. tit. 2. - - - *De liberis et posthumis he-
redibus instituendis, vel
exheredandis.*

Institutes lib. 2. tit. 13. - - *De exheredatione liberorum.*
Code lib. 6. tit. 28. - - - *De liberis præteritis, vel
exheredatis.*

Domat's Civil Law, part 2, b. 3. tit. 2. sect. 2.

Fuero Viejo, b. 5. tit. 5.

Fuero Real, b. 3, tit. 9.

Ordenamiento Real, b. 5 tit. 6.

Civil Code, b. 3. tit. 2. chap. 6. sect. 4.

OF DISINHERISON.

What is meant by disinherison, - - - - -	LAW 1
Who may disinherit and who may be disinherited, - - - - -	2
How disinherison is to be effected, - - - - -	3
For what causes the father or grandfather may disinherit his descendants, - - - - -	4
That the father may disinherit his son, if the lat- ter should turn juggler against his wish; and of the other causes for which he may disinherit him, - - - - -	5
That the father or grandfather may disinherit his children or grand-children, if the latter should be unwilling to redeem them from captivity, - - - - -	6
That the father may disinherit his son for becom- ing a Moor, Jew or heretic, - - - - -	7
What is the effect of disinherison, when legally	

- made, - - - - - LAW 8
- That when the son is disinherited in the beginning or end of the will, he is understood to be disinherited in all the degrees of the succession, 9
- That a will in which the father neither disinherits nor mentions his son, is not valid, - - 10
- For what causes the son can or cannot disinherit his father, from the estate which he possesses in his own right, - - - - - 11
- That a man may disinherit his brother with or without cause, - - - - - 12
- For what causes the heir may lose the estate to which he was entitled, - - - - - 13
- What reward he ought to have who cannot be instituted heir, or receive a legacy, when he is made heir or legatee by any one, and he denounces his incapacity himself, before he is accused of it, - - - - - 14
- In what cases the heir would not lose the succession, although the death of the testator should not be avenged, - - - - - 15
- That the king to whom the estate is forfeited, on account of the unworthiness of the heir, ought to pay the debts of the deceased and the legacies he had bequeathed, - - - - - 16
- In what cases the king will not be entitled to the estate which the heir loses by reason of some offence he had committed, - - - - - 17

TITLE VII.

In what manner and for what causes a man may disinherit by will, his heir at law ; and for what causes the person instituted heir, may lose the estate, though he had not been disinherited.

LAW 1.

What is meant by disinherison.

Disinherison is the act by which a man is deprived of the right he had to inherit the estate of his father or grandfather, or any other of his relations ; as where the testator says : “ I disinherit my son ; or I wish him to be deprived of all my estate, for such offence he committed against me.” So it would be if he should use any similar expressions relative to his grandson, or any other person entitled by law, to inherit his estate. (1)

LAW 2.

Who may disinherit and who may be disinherited.

Every one who has the right to make a will may disinherit another. But if the will in which any one is disinherited, be annulled for some just cause, or revoked by the testator, or remain without effect, because he who is instituted heir, is unwilling to enter the estate, then the person disinherited will not be prejudiced thereby. For, in as much as the will is not valid, the disinherison will be also void. We further

(1) *C. art. 126, p. 234.*

say that the descendants in the direct line, may be disinherited by their ascendants, if the latter assign any just cause therefor, and be at least ten years and six months old. Likewise all ascendants in the direct line, may be, for the same reason, disinherited by their descendants, with respect to the estates belonging to their sons or grandsons only. But with respect to all other relations who are in the collateral line, though they may inherit from each other, when they are the nearest kin of the deceased who died intestate and without children, nevertheless the testator may disinherit them by his will, if he think proper, with or without cause; and he may institute for heir, any person not related to him (*estrño*), and such heir will inherit all his estate, though his relations make opposition thereto and the testator had made no mention of them in his will. (1)

LAW 3.

How disinherison is to be effected.

When the testator wishes to disinherit one of his descendants, in the direct line, whether male or female, and whether they be under his power or not, he must do it expressly, mentioning them by their name or surname, in such manner that it may be certainly known whom he intended to disinherit. There is, however, a way in which the testator may disinherit a descendant, without mentioning him by name; as where he has one son only and should say: "I disinherit my

(1) *C. art. 126 & 128, h. 234 & 236.*

son.” It would be then sufficiently understood who the person was he disinherited, since he had but one son. But if he should have several sons, none of them would be disinherited by such expressions. And we say that if the testator have but one son whom he wished to disinherit, and should designate him by his bad qualities ; as by saying : “ I disinherit the wicked fellow, the thief, the murderer, who does not deserve to be called my son, on account of such offence he has committed against me ;” by the like expressions, the son would be as effectually disinherited as if he had been mentioned by name. And whenever any one is disinherited, it must be done unconditionally, for the whole of the estate to which he was entitled, and not for a part only ; otherwise the disinherison will not be valid. (1)

LAW 4.

For what causes the father or grandfather may disinherit his descendants.

There are certain causes for which the father may disinherit his son ; as where the son knowingly, violently and in anger lays his hands upon his father, in order to strike or seize him ; or if he offend him by grievous words, though he should not strike him ; or accuse him of an offence which, if proved, would expose the father to suffer death or banishment, or would render him infamous. But if the offence be such as to affect the person of the king or the common good

(1) C art. 127 & 128, p. 236.

of the country and the son prove it, the father cannot disinherit him on that account. We also say that the father may disinherit the son, if the latter attempt his life by arms or poison, or in any other manner whatever ; or if the son should have carnal commerce with his step-mother ; or if he defame his father ; or do him such injury, as to expose him to the loss or deterioration of the greater part of his estate. For on the proof of any of these causes, mentioned in the will of the father or grandfather, the son or grandson will lose the right he would have had to their estate, had he not committed the offence. The father may likewise disinherit his son, for preventing him from making his will, by another will which he subsequently makes. And moreover all those to whom the testator intended to bequeath any thing, will be entitled to recover the amount which they can prove the testator would have given them, had he made such will. (1)

[No other part of this law in force.] (a)

LAW 5.

That the father may disinherit his son, if the latter turn juggler against his wish ; and of the other causes for which he may disinherit him.

We likewise say, that if the father should wish to give his daughter in marriage to any one, and endow her according to his and her own fortune, and she should refuse to marry accordingly, and should after-

(1) C. art. 130, 131 & 133. p. 236, 238.

(a) C. art. 129, p. 136.

wards lead an abandoned life, he may disinherit her on that account. But if he delay marrying her, until she be twenty-five years of age, and she afterwards become a prostitute, or marry against his wish, he cannot disinherit her for that reason ; as it ought to be presumed that he was to blame for the fault she had committed, by delaying for so long a time, to marry her. And we also say that if the father should become a madman or a lunatic, so as to remain deprived of his reason and in a helpless condition, and his children or other descendants, in the direct line, should take care of him or administer to his wants ; if afterwards he should be restored to his reason, he might, on that account, disinherit those who, had they not committed such offence, would have inherited from him by law. (1)

LAW 6.

That the father or grandfather may disinherit his children or grand-children, if the latter should be unwilling to redeem them from captivity.

If any man or woman, having children, be taken captive, and their children neglect or be unwilling to redeem them, when they have the means of doing it ; if either of the parents should afterwards be liberated from captivity, he or she may disinherit such children, on account of their conduct. (2)

[No other part of this law in force.]

(1) C. art. 130, Nos. 6 & 12, p. 236.

(2) C. art. 130, No. 7, p. 236.

LAW 8. (a)

What is the effect of disinherison, when legally made.

If the father disinherit his son, for any of the causes mentioned in the preceding laws, then the son shall lose his estate on the truth of the cause being proved. We also say that if the father should assign several of the above mentioned reasons at the time he disinherited his son, and either he or the heir mentioned in the will, should be unable to establish them all, it will suffice if one only of them be proved. But if he should disinherit him, for any other cause than one of those mentioned in the preceding law, the disinherison will not be valid. (1)

LAW 10. (b)

That a will in which the father neither disinherits nor mentions his son, is not valid.

Preteritio, in Latin, means in common speech, the omission by the testator to mention in his will, those who were entitled by law, to inherit from him, by observing silence in this respect; as where the father makes a stranger, or any of his relations, his heir, without mentioning his son, either with a view to institute or disinherit him. A will made in this way will not be

(a) The preceding law is not in force. For its head, see the index of this title.

(1) C. art. 128, 129 & 138 p. 236 & 238.

(b) The preceding law is not in force. For its head, see the index to this title. C. art. 40, p. 216.

valid. (a) Wherefore, when the father wishes to disinherit his son, he should do it for a cause certain, expressly set forth in the will, declaring that it is on that account that he disinherits him, otherwise the will would not be valid. And although he should mention a certain cause for which he disinherits his son or grandson, yet faith shall not be given to it, unless it be proved either by himself or by those whom he institutes as his heirs. And if he should not mention any certain cause for which he disinherits any of his descendants, the person instituted heir by the will, cannot afterwards shew that any cause existed, nor be heard in that respect, notwithstanding he should wish to prove that the son had committed an offence against his father, for which he ought to have been disinherited: but on the contrary we say, that the son will be entitled to the estate of the father, and the stranger mentioned in the will, shall have no right whatever to the same. (1)

[No other part of this law in force.]

LAW 11.

For what causes the son can or cannot disinherit his father of the estate which he possesses in his own right.

There are eight determinate causes for each of which children may disinherit their fathers and mothers or their other ascendants, from the estates which they possess in their own right. And as we have mentioned in the preceding laws, the causes for which the father

(a) This provision has been abrogated. C. art. 120, p. 234.

(1) C. art. 128 & 133, p. 236 & 238.

may disinherit his child, we will now explain the eight causes herein alluded to. The first is, where the father endeavours to cause the death of his child, by accusing him of having committed a crime which would expose him to the loss of his life or limb; except the accusation concerned the person of the king. The second is, where the father attempts to destroy the life of his son, either by poison, arms, or in any other manner whatsoever. The third is, where the father has carnal connexion with the son's wife. The fourth is, where the child wishing to dispose by will, of the property which the law permits him to dispose of, is forcibly prevented by the father, from doing it. The fifth is, where the father attempts to destroy the life of his own wife, or the wife that of her husband, either by poison, or in any other manner whatsoever; for the child may disinherit either of them who is guilty of such offence. The sixth is, where the child is a madman or lunatic, and the father refuses to supply his necessary wants. The seventh is, where the son falls into captivity and the father be unwilling to redeem him: the children may disinherit him on that account. (a) And we finally say, that when the child wishes to disinherit his father, he must expressly set forth one of the forementioned eight causes, as a reason why he does it, and prove the same; otherwise the will would not be valid, as to the disinherison, yet it would be as to the legacies and other dispositions contained in it. (1)

[No other part of this law in force.]

(a) The eighth cause expressed in this law, is not now a reason for disinherison.

(1) *C. art. 132 & 133, ff. 236 & 238.*

LAW 12.

That a man may disinherit his brother with or without cause.

We have already shewn the causes for which both the descendants and ascendants in the direct line may disinherit one another. We will now explain the manner in which those who are related in the transverse line, as brothers, may be disinherited. And we say that one brother may disinherit another, with or without cause; and even if he should not mention him in his will, he may leave his estate to whomsoever he pleases, when he has no children, nor other descendants, in the direct line, nor father or other ascendants, provided he do not institute for heir a person of bad life, or who is infamous (*de mala vida o enfamado.*) For then the institution would not be valid, and the brother (a) may overthrow the will and obtain the estate of the testator, on making due proof of the fact before the judge. Nevertheless there are three cases in which the brother's will cannot be overthrown, notwithstanding he may have instituted a person infamous, or of bad life, for his heir. The first is, where he disinherits his brother, for having, in some way, attempted his life. The second is, where the brother had, at any time or place, accused him of an offence which exposed him to the loss of life or limb. The third is, where he has caused the testator to lose the greater

(a) That is, brothers of the whole and not of the half blood.

part of his estate, or had endeavoured to do it. For, on proof being made of these three causes, one brother may disinherit another, notwithstanding the testator may institute an infamous person as his heir. And we moreover say that if it can be proved that one brother had committed against the other, any of the three offences herein mentioned, and the brother who suffered the injury should have died intestate, the other cannot either claim or inherit any part of his estate, in virtue of his relationship. (1)

LAW 13.

For what causes the heir may lose the estate to which he was entitled.

The ancient sages have prescribed six causes for each of which the heir may lose the estate of the deceased. (a) The first is, where the death of the deceased was caused by the act or advice of some of his family (*compania*), and the heir knowing the fact, enter upon the estate, before he makes complaint thereof to the judge. But if the testator had been put to death by a person who is not of his family, the heir may enter upon his estate, provided he denounce the crime within five years thereafter. And if he fail to do it within

(1) *C. art. 66, p. 160.*

(a) By the civil code, these six causes have been reduced to three. No notice will be therefore taken of any other. *C. art. 66, p. 160.—ibid art. 67, p. 222.—ibid art. 198, p. 252.*

that time, he will lose the estate as a person unworthy to retain it, and it will be forfeited to the king. (a) The third is, where it is known with certainty that the death of the testator, was produced by the acts, advice or fault of the heir. And the legatees will lose the legacies, for the same causes for which the heir loses the estate. (1)

[No other part of this law in force.]

LAW 17. (b)

In what cases the king will not be entitled to the estate which the heir loses by reason of some offence he had committed.

As there are persons who may conceive that every thing taken from those who are declared unworthy of having them, ought to belong to the king's chamber, we will explain ourselves in this respect. And we say that where the testator bequeaths any specific thing to a man whom he requests to become the guardian of his children, called in Latin *tutor*, and the latter be unwilling to become so accordingly, he will not be entitled to the legacy. Yet the thing of which he is thus deprived, on account of his ingratitude to the testator, will belong to the children of the deceased, and not to the king. We also say, that if a man institute any one for heir, believing him to be his child,

(a) It seems that now the estate would go to the next of kin to the deceased. C. art. 70, p. 160.

(1) R. l. 11, tit. 8, b. 5.—C. art. 66, Nos. 1 & 3, p. 160.

(b) The preceding laws, 14, 15 & 16, are not in force. For their heads, see the index to this title.

and after the death of the testator, it be discovered that such was not the fact, the heir will lose the estate, in as much as he would not deserve it, it being known with certainty that he was not the child of the deceased; in which case, the estate will not go to the king, but to the nearest relation of the testator.

[No other part of this law in force.] (a)

(a) C. art. 198, p. 252.

TITLES

Of the Roman Laws which relate to the title of LAS SIETE PARTIDAS, on querella inofficiosi testamenti.

Digest lib. 5. tit. 2. - - - - De inofficioso testamento.
Institutes lib. 2. tit. 18. - - De inofficioso testamento.
Code lib. 3. tit. 28. - - - - De inofficioso testamento.
Domat's Civil Law, part 2. b. 3. tit. 2. sect. 1. 2. 3 & 4.

DE QUERELLA INOFFICIOSI TESTAMENTI.

Who may bring the action of *inofficiosi testamenti* ;
against whom it may be brought, before whom,
for what causes and in what manner, - - - LAW 1

Whether or not a man can cause his brother's
will, in which he is not mentioned, to be annul-
led, - - - - - 2

In what cases the brother cannot annul the will
by which the testator has instituted his slave
for heir, - - - - - 3

In what cases those who are disinherited by will,
cannot cause the same to be annulled, - - - 4

That if the father give his child his legal portion,
he may do what he pleases with the remainder
of his estate, - - - - - 5

That he who acquiesces in or consents to the will
by which he is disinherited by his father, can-
not afterwards cause it to be annulled, - - - 6

What is the effect of a judgment by which a will
is annulled, - - - - - 7

TITLE VIII.

That he who is wrongfully disinherited, may overthrow the will by what is called in Latin, querella inofficiosi testamenti.

LAW 1.

Who may bring the action of inofficiosi testamenti; against whom it may be brought, for what causes and in what manner.

Where the son or the grandson of the testator, or any other of his descendants, in the direct line, who would inherit from him, if he should die intestate, have been disinherited by him, wrongfully and without cause, they may complain (*fazer querella*) before the judge, in order to cause the will to be annulled. The judge ought thereupon to hear the complaint and summon the person who has been instituted heir, and if he find that the complainant has been wrongfully disinherited, he ought to adjudge the will to be void, and order the estate to be delivered to the son or grandson who made the complaint. And this is what is called in Latin, *querella inofficiosi testamenti*; that is, a complaint against a will which is made contrary to the paternal affection and regard which the father ought to have for his child. And what we say in this law, with respect to descendants, applies equally to ascendants who are disinherited wrongfully and without a just cause.

[No other part of this law in force.] (a)

(a) C. art. 26, p. 214.—ibid art. 120, p. 234.

LAW 2.

Whether or not a man can cause his brother's will in which he is not mentioned, to be annulled.

When the testator has no relations in the direct descending or ascending lines, he may institute any person he pleases, for heir, and do what he thinks fit with his estate, notwithstanding he may have brothers or other relations in the transverse line. And though he should not mention his brother in his will, nor leave him any part of his estate, nevertheless such brother will have no right to complain or to cause it to be annulled, unless he who is instituted heir, were a person of ill fame; or had been the slave of the testator; or having been enfranchised by him, had afterwards caused himself to be instituted heir, by means of artifices he practised upon the testator without having done any thing for which he deserved it. In either of these cases, the brother may complain to the judge and cause the will to be annulled. But if such brother had committed upon the testator, any of those offences for which one brother may disinherit another, according to what we have said in the title of *disinherison*, then he could not complain of the will and cause it to be annulled. And we finally say, that the other relations in the transverse line, cannot complain of the testator's will, in order to cause it to be annulled, and will have nothing to claim, whenever the testator has bequeathed his estate, or made other disposition of it. (1)

(1) C. art. 21, p. 212.

LAW 4. (a)

In what cases those who are disinherited by will, cannot cause the same to be annulled.

There are many cases in which a will cannot be annulled, notwithstanding any one be disinherited thereby. For if any of the testator's descendants, in the direct line, should commit any offence for which he deserved to be disinherited agreeably to what we said in the title of *disinherison*, and the testator disinherit him accordingly, if then the person instituted heir can prove that the offence was actually committed, the will cannot be annulled. And so it would be with respect to other persons who are disinherited for such offence, whether they were related to the testator in the ascending or transverse lines. We likewise say that if any one who has been disinherited, should be silent and not complain thereof, within five years from the time the heir had entered upon the estate of the testator, he cannot do it afterwards; and if he should, alleging that he could show that he was wrongfully disinherited, he ought not to be heard, unless he were a minor under fourteen years of age. For in that case, he might do it, at any time before he arrived at full age, or even within four years thereafter.

(a) The preceding law is not in force. For its head, see the index to this title.

LAW 5.

That if the father give his child his legal portion, he may do what he pleases with the remainder of his estate.

If the father, in making his will, leave the legal portion of his estate to his child, and institute in the same will, another person, as heir, to the remainder, or dispose of it, in any other way; in that case, his son, though he should complain of the will, cannot cause it to be annulled. We likewise say that if the father bequeath to his son, any part of his estate, less than his legal portion, nevertheless the son cannot, on that account, cause the will to be annulled, but he may require that the deficiency of his legal portion be made good to him, and the other heirs will be bound to do it accordingly. (1)

[No other part of this law in force.] (a)

LAW 6.

That he who acquiesces in or consents to a will by which he is disinherited by his father, cannot afterwards cause it to be annulled.

In whatever manner a son or grandson acquiesces in or consents to a will by which he is disinherited, as if a legacy has been therein bequeathed to him or to his child or to any other person under his power and he receive it; or if he be the advocate or attorney and maintain the will or any of the legacies contained in it,

(1) C art. 19, p. 212.—*ibid* art. 26, p. 214.

(a) C. art. 120, p. 234.—*ibid* art. 208, p. 254.

or acquiesce in it, in any other similar manner, he cannot afterwards complain of it and cause it to be annulled.

LAW 7.

What is the effect of a judgment by which a will is annulled.

When a will is annulled for any of the causes mentioned in the laws of this title, such is the effect of the judgment that as soon as it is rendered, if the heir do not appeal therefrom, or if he appeal and it be confirmed against him, he will lose that part of the estate to which he had been instituted heir, unless he were the son or grandson of the testator. For notwithstanding the will may be annulled on the complaint of either of his brothers, he will nevertheless have his legal portion of the estate. We likewise say that although the will should be annulled for any of the foregoing causes, at the suit of the son or grandson who had been disinherited; yet the legacies and enfranchisement of slaves contained therein, will be in no way affected thereby. And we moreover say that the heir instituted by the will must prove the truth of the offence which the testator assigned in his will, as the cause for disinheriting his son, in the manner prescribed in the title which treats of *disinherison*. (1)

[(1) C. art. 133, p. 238.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
Legacies.

Digest lib. 30. 31 32. - - - *De legatis et fidei commis-
sis primo, secundo et
tertio.*

Institutes lib. 2. tit. 20. - - *De legatis.*

Code lib. 6. tit. 37. - - - *De legatis. (a)*

Domat's Civil Law, part 1. b. 4. tit. 2.

Fuero Real, b. 3, tit. 5.

Civil Code, b. 3. tit. 2. chap. 6. sect. 5.

OF LEGACIES.

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That the testator may obligate his legatees to give to another person, the amount that he be- queaths to them, - - - -	3
That the testator may oblige the heirs of those to whom he bequeaths something by his will, to give to another person, the amount of what he so bequeaths, - - - -	4

(a) Digest, lib. 33, tit. 1, 2, 3, 5, 6, 7, 8 & 10 —ibid, lib. 34, tit. 1, 2,
3, 4, 5, 6, 7 & 9.—ibid, lib. 35, tit. 3.—ibid, lib. 6, tit. 2, 3, 4.—ibid, lib.
37, tit. 5.—Institutes, lib. 2, tit. 21.—Code, lib. 6, tit. 35, 38, 40, 41, 43, 44,
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TITLE IX.

Of the legacies which men bequeath by their wills.

LAW 1.

What is meant by legacy ; who may bequeath it ; to whom and in what manner.

A legacy is a sort of donation, which the testator makes to another by his will or codicil, either through motives of piety, or for the benefit of his soul, or for the advantage of the legatee. Testators may likewise make what is called in Latin, *donatio causa mortis*, which means a thing which the testator gives to another when he thinks that he is about to die : of this we spoke in the title of donations. (a) Every person

(a) This last sort of donation is abrogated by the code. C. art. 112, p. 232.

may give such legacy, who is capable of making a will or codicil. We likewise say, that every person who is capable of being instituted heir, may receive a legacy: and we have fully shewn in the laws which spoke of that matter, in the title of *wills* and *institution of heirs*, who they are that can or cannot be instituted heirs. But we say that notwithstanding any one be incapable of receiving a legacy, at the time it is given to him by will, nevertheless if the impediment should not exist at the time of the death of the testator, he will not thereby lose the legacy, but will be entitled to receive it. (1)

LAW 2.

That where several persons are instituted heirs by a will, one of them may take the legacy bequeathed by the testator, though he were unwilling to become his heir.

If a man institute several heirs jointly by his will, and bequeath to one of them a specific thing, as a legacy, over and above what he had given to the others, we say that the legatee may take the legacy, notwithstanding he renounce the estate to which he had been instituted heir, unless he had been expressly forbidden by the will, from taking the legacy, in case he should not accept the estate as heir.

LAW 3.

That the testator may oblige his legatees to give to another person the amount of what he bequeathed to them.

The testator may, by his will or codicil, order and oblige his heir instituted therein, as well as all those who have a right to succeed to him by law, if he should die intestate, to give or to pay something to another person. And they, as well as their heirs, will be bound to comply with his request, as soon as they come to the possession of his estate.

[No other part of this law in force.] (a)

LAW 4.

That the testator may oblige the heirs of those to whom he bequeaths something by his will to give to another person, to the amount of what he so bequeaths.

If the testator, at the time he institute any one as heir, express himself thus: "I order that whoever may be the heir of my heir, shall give so many maravadis to such a person;" or if he should say: "I request such a one who is to inherit my estate, to order his heir to do or to give such a thing to another person;" we say that such a legacy would be valid, and the heir of the testator's heir will be bound to comply with it. But if the testator had said: "I make such a one my heir; and if such other person, mentioning him by name, should happen to inherit his estate, when he dies, I order that such person give such a thing or

(a) C. art. 40, p. 216.

may give such legacy, who is capable of making a will or codicil. We likewise say, that every person who is capable of being instituted heir, may receive a legacy: and we have fully shewn in the laws which spoke of that matter, in the title of *wills* and *institution of heirs*, who they are that can or cannot be instituted heirs. But we say that notwithstanding any one be incapable of receiving a legacy, at the time it is given to him by will, nevertheless if the impediment should not exist at the time of the death of the testator, he will not thereby lose the legacy, but will be entitled to receive it. (1)

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(a) C. art. 40, p. 216.

so many maravadis to such a man ;” such legacy would not be valid, nor would the person named therein, be bound to pay it ; and this because the second heir would not become so by the wish of the testator, but by accident. For no man can oblige another to give any thing on his account, when he has not first given this other, something of his own.

LAW 5.

In what cases the heir is not bound to pay the legacies bequeathed by the testator. (a)

[Not in force.]

LAW 6.

If the testator give his slave to another person, on condition that he enfranchise him, and moreover order him to give something to another person, the heir will not be bound to comply therewith.

If the testator give his slave to any one, under condition that he enfranchise him immediately ; and in consideration of the gift, impose a charge upon the person receiving it, by requesting or ordering him to give any thing to another person ; we say that he cannot impose such charge, nor will such person be bound to pay the legacy. But if the testator had given him the slave, on condition that he should enjoy his services for a certain time, and then to set him free ; in that case, he may require him to give something to another person, and he who receives the slave, will be bound to

(a) This law speaks of certain verbal dispositions made by the testator, which are now prohibited by the code. C. art. 90, p. 228.

pay the legacy to the amount of the benefit he shall derive from his services, from the day he took him until he shall have enfranchised him. And likewise we say, that if the master himself enfranchise his slave and give him no part of his estate, he cannot, in consideration of the enfranchisement, impose upon the slave any charge, by requiring him to give something to another person, by way of a legacy. We also say, that if a man request any person to enfranchise his slave, bequeathing him something, as an inducement to do it; if the owner of the slave afterwards receive the legacy, he will be bound to enfranchise him, notwithstanding the slave should be worth more than what he received, in as much as by his receiving the legacy, it is presumed that he took it as an equivalent for the slave. But if the slave belonged to a third person, and should be worth more than what the testator had given, so that the owner be unwilling to part with him for that price, then he who had been requested to enfranchise him, will not be bound to give more for him than he had received. And if the slave cannot be obtained for that price, he should preserve the money and endeavour to obtain him for the same; as there are things which, though they cannot be accomplished one day, may be on another. But if the testator bequeath a certain sum of money to any one, and require the legatee to give a greater sum to another person, we say that the legatee will not be bound to pay more than he had received, notwithstanding he should take what the testator had bequeathed him.

LAW 7.

That the heir ought to comply with the request of the testator, when he is required to give to another person the amount he had received from the deceased.

If the testator institute another person, as his heir, jointly with his own son, saying: "I request you, when you die, to institute my son for your heir, jointly with your son," if such heir take the estate of the testator, he will be bound to comply with his request, to the amount of what he had received of his estate, together with the fruits he had derived from it.

[No other part of this law in force.] (a)

LAW 9. (b)

That the legatee ought to be named or designated with certainty.

The legatee ought to be pointed out and designated with certainty, either by his name or by other marks, so that there can be no doubt as to his person; for if there be no certainty in this respect, the legacy will be null; as if the testator, having two friends of the same name, should say: "I give such a one, my friend, so many maravadis or such a thing," and should not designate him by his surname. For in as much as it cannot be known with certainty to which of his friends he gave the legacy, it will not be valid, nor will the

(a) C. art. 40, p. 216.

(b) The preceding law is not in force. For its head, see the index of this title.

heir be bound to pay it. But if the person of the legatee be certain, though the testator may err as to his name or surname, he will not be prejudiced thereby, but will be entitled to the legacy. (1)

LAW 10.

What things may be bequeathed.

We have spoken in the preceding laws of the persons who may give and of those who may receive legacies. Such legacies are called in Latin, *de legatis primo*. We will now shew what are the things which may be given as legacies, called in Latin, *de legatis secundo*; and we say that the testator may bequeath as a legacy, any thing which belongs to him.

[No other part of this law in force.] (a)

LAW 11.

That the testator may bequeath as a legacy, a thing that is pledged. (b)

[Not in force.]

LAW 12.

That a thing not yet in existence, may be bequeathed as a legacy.

The testator may bequeath as a legacy, not only things that are in existence, but those that are not at

(1) C. art. 200 & 201, p. 252.

(a) C art. 147, p. 240.

(b) Abrogated by the code, art. 146, p. 240.

the time of the bequest ; as the fruits of the earth or trees, the offspring of slaves or the young of cattle and other beasts. But we say that if the testator bequeath a thing, when he is not certain, whether it be in existence or not, as a slave or any thing else which is in another place ; then the heir ought to give security to the legatee, that if he should obtain it, in any manner whatever, he would deliver it to him, and this the heir will be bound to do at his own expense.

LAW 13.

What things cannot be bequeathed as legacies.

Things sacred, as those belonging to the church ; those which appertain particularly to the king, as his palaces, gardens, and cellars, which can be neither sold nor alienated ; the public squares, the threshing grounds and other things common to cities and towns and all other similar things cannot be bequeathed as legacies. We also say that the marble, the columns, the doors and timbers which are incorporated in houses and other buildings and make part thereof, cannot be the object of legacies. And if any one bequeath any of these or similar things, the bequest will not be valid, nor will the heir be bound to deliver them, or their estimated value to the legatee. Such legacies are prohibited, because these things serve to ornament the towns and places in which they are constructed, and it is not proper to separate them from the buildings themselves. And if the testator should bequeath to another, a thing which was at the time, of a nature and condition to be given legally as a legacy ;

if afterwards its condition happen to be changed in such manner that the testator, were he again to make his will, could not bequeath it; we say that such legacy would not be valid. Such would be the case if the testator were to bequeath a thing which was not sacred at that time, but which became so afterwards, without the interference and fault of the heir. For in that case, the heir will not be bound to give the estimated value of such legacy. This law will apply in all other similar cases, where the state or condition of the thing given as a legacy, should undergo any change, without the fault of the heir.

LAW 15. (a)

That incorporeal things may be bequeathed as legacies.

A legacy may be made not only of corporeal things, as estates and other things which men may touch and see, but also of those which are not so, as the rights or claims which a man may have against his debtors. And we say that other rights, as those of services, either on persons, houses or fields, may likewise be bequeathed. But if the testator had already demanded and received the debt of his debtor, during his life time, such legacy as this will not be valid, nor the heir bound to give its value, because the testator is understood to have revoked the legacy, in as much as he demanded and received the debt. But if the debtor had, of his own accord, paid the debt to the testator,

(a) The law which precedes this, is not in force. For its head, see the index of this title.

without its having been demanded of him, then the heir will be bound to give the thing, or to pay the estimation thereof to the legatee; for in as much as the debtor paid the debt of his own will, without its being demanded of him, it is to be presumed that the testator received it, in order to keep and preserve for the legatee.

LAW 16.

That he who bequeaths as a legacy, a thing which he holds in pledge, is not understood to release the debt for which it was pledged.

Where a man holds a thing in pledge for money lent to the pledgor, and the pledgee bequeath such thing to the pledgor, the legacy will be valid. But the heirs will preserve the right of claiming from the pledgor, the money which the testator had lent upon the thing.

LAW 17.

In what cases the legacy is understood to be revoked, when the testator alienates the thing bequeathed.

[Not in force.] (a)

LAW 18.

Whether or not a legacy be valid, which the testator makes of the money that he believes he has in his chest.

If the testator, believing that he had ten maravadis in his chest, should say: "I bequeath to such a per-

(a) Abrogated by the civil code, art. 187, p, 250.

son the ten maravadis which I have in my chest ;” the legacy will be valid, if as much money should be found there. But if it should be a less sum, the legacy will be valid for as much as is found in the chest, and the heir will not be bound to give any more. And if there should be more than ten maravadis, the heir will not be bound to give more than ten. Yet if there were ten maravadis in the chest when the testator died, and the sum be diminished by the fault of the heir, he would nevertheless be bound to give that number.

LAW 19.

That the legacy is valid which a man makes to another to whom he believes he was indebted, when in truth he was not.

If the testator bequeath to any one a certain number of maravadis, saying : “ I order that the hundred maravadis which I owe such a one, shall be given to him ;” if the testator should happen to owe nothing to such person, nevertheless the heir will be bound to pay the one hundred maravadis, in as much as it is presumed, that the testator intended to make him a present of them. But if he were really indebted to the legatee in that sum, the heir will not be bound to pay more than the amount of the debt due.

LAW 20.

That a legacy is not affected by a false reason mentioned as the inducement for giving it.

If the testator, when he bequeaths a legacy, allege a false reason for doing it, the legacy will not be im-

paired thereby ; as if he should say : “ I bequeath so many maravadis, or such a thing to such a person who has done me such an honour or rendered me such a service.” For notwithstanding no such honour or service had ever been rendered, nevertheless the legacy will not be impaired thereby, and the heir will be bound to pay it.

LAW 21.

Of the conditions that may be annexed to legacies, and of the causes and objects for which they may be made.

Men may annex conditions to the legacies which they bequeath, or express the causes. or the objects for which they are made. And conditions may be annexed in the following words ; as where the testator says : “ I bequeath such a thing to such a one as a legacy, provided he should do such a thing for me, or render me such service, or if he shall have already done it.” Such condition as this, may be annexed to legacies, relating either to the time past or to come. And if the condition be already accomplished, or should afterwards be, the legacy will be valid, and the legatee may immediately claim it ; but he cannot, nor ought he to claim it before the accomplishment of the condition. At other times the testator may assign a reason for bequeathing a legacy, which is called in Latin *causa*, as where he says : “ I bequeath to such a person one hundred maravadis for a service which he rendered me.” Such reasons as these, ever relate to the time past. And we say that though the reason mentioned as the cause of the legacy, should prove untrue,

nevertheless the legacy will be valid and the legatee will be entitled to claim and recover it immediately. Legacies are sometimes made in the form called in Latin, *modus*, that is for a specified object (*manera*); as where the testator says: "I bequeath to such a woman, so many maravadis that she may marry such a man." This or other similar legacy will be valid, and the thing bequeathed ought to be immediately delivered to the legatee on his giving security, that he will endeavour to accomplish what the testator had ordered, and as soon as he shall have accomplished it, he will acquire the property of the thing bequeathed; and so we say it would be, if the legatee should do every thing in his power to comply with what the testator had ordered, though he should not be able to do it. Each of these kinds of legacies were made in Latin, by a certain manner of expression, the first being by the word *si*, the second by *quia*, and the third by *ut*.

LAW 22.

Whether or not a legacy be valid, when the accomplishment of the conditions annexed to it, is prevented by accident or in any other manner.

If the condition annexed to the legacy be of such a nature as that it is in the power of the legatee to accomplish, and he do all he can to accomplish it accordingly, and he be prevented therefrom by some accident without his fault, the legacy will be as valid as if the condition had been complied with; as where the testator bequeaths a certain sum of money to any one, on condition that he should emancipate his slave. For

if the slave die a natural death or by accident, provided he be not killed by any other person, the legacy will be valid. And this, whether such accident happen to the person of him who was bound to accomplish the condition or to the person who was the subject of it. But if he should be prevented from complying with the condition by the act of another person, as where any one kill the slave, before the master could enfranchise him, the legacy would not be valid, nor would the heir be bound to pay it. But if the testator should order his slave to be enfranchised, on condition he render a service to any one ; if the slave do all in his power to render it accordingly, and be prevented by some other person, the legacy will nevertheless be valid and the slave shall be enfranchised in the same manner as if he had complied with the condition : and this because the laws are ever favourable to enfranchisement and the liberties of men. We likewise say that where the testator bequeaths a legacy under a condition which is in the power of the legatee and some other person to perform, and it should not be performed, through the fault of the legatee or from any accident that prevented him from doing it, then the legacy would not be valid ; as where the testator should say : “ I bequeath a thousand maravadis to such a person, provided he intermarry with such a woman.” For if the legatee be unwilling to marry her accordingly, or if either of them die before the marriage take place, the legacy would not be valid. But if he should be prevented from accomplishing the marriage, through the fault of the woman, who would not consent to it, nevertheless the legacy will be valid

and the heir bound to pay it. This law applies in all other cases where legacies are given under similar conditions, according to what we have above said.

LAW 23.

Where the testator bequeaths a slave or any other thing generally as a legacy, to whom belongs the right of selecting it.

Where the testator bequeaths a slave to any one generally, without designating him ; if he should have but one slave, the heir would be bound to deliver him up to the legatee or some other slave equally good. But if he should have several slaves, then the legatee will have the right of selecting which of them he pleases, provided he do not choose the best nor him who was the intendant and steward of the testator, on account of his knowlege of the affairs of the estate. And if the deceased has no slave at all, it will be at the option of the heir to buy one of ordinary goodness and give him to the legatee. And what we here say of slaves, ought to be observed with respect to beasts and other things bequeathed in a similar manner. But if the testator should bequeath to any one a house, without designating what house, then the heir may give to the legatee which of the testator's houses he pleases ; yet if there should be but one house, the legatee will be entitled to it, and it ought to be delivered to him. If, however, the testator should have no house at all, the heir will not be bound to buy one : and we say on the contrary, that the legacy will not be valid, in as much as it is to be presumed that it was made rather from derision than through any other motive.

And what we here say relative to houses, applies to all other edifices bequeathed to any one in such general terms. (1)

LAW 24.

In what manner subsistence ought to be furnished to those to whom it is bequeathed.

Testators sometimes bequeath subsistence to other persons, without saying how much or in what manner it should be furnished by their heirs ; in this case we say that if the deceased, during his life, had been in the habit of giving to the legatee, a certain quantity of bread or money, then the heir will be bound to furnish the same quantity. But if the testator had not been in the habit of giving any certain quantity to the legatee, then the heir will be bound to furnish him with a maintenance suitable to the condition of the legatee and in proportion to the estate he had inherited from the testator.

LAW 25.

That he to whom the right of choosing a thing is bequeathed, cannot recant after he has once made his election.

Testators sometimes give a man the right of choosing either of two things which they bequeath. In that case, we say that when the legatee shall have once made a choice, he cannot afterwards recant, though he should wish to return it and take the other. But if the right of choosing had been left by the testator to the

(1) C. art. 48, §, 251.

option of a third person, who either will not or cannot make it within one year thereafter, then the legatee may choose for himself.

LAW 26.

Where the choice of a thing is bequeathed by the testator to two persons who disagree concerning the same, what is to be done in that case by the judge.

Where the testator bequeath one of two things to two persons, leaving to them the right of selecting : as if he should bequeath to them one of his slaves or houses or other similar thing at their option ; if then the legatees disagree among themselves, as to the choice, the judge shall order them to cast lots, and he who gains shall have the right of taking which of them he pleases, but he shall give to the other the estimated value of the share he had in the thing, which estimation ought to be made by two good men. And so it would be if such thing were bequeathed to any one, leaving to him the right of selecting. For if the legatee should die before he made the choice, it ought to be made by his heirs ; and if they disagree, then they ought to cast lots in the manner above mentioned.

LAW 27.

That a legacy made of a mine or quarry of stone will not pass to the heirs of the legatee.

If a testator should have a mine, or a quarry of stone on his land, and should bequeath to any one the right of taking stone or digging metals out of it, for the

benefit of the legatee, the legacy will be valid during the life of the legatee. But after his death it will cease to have effect, and his heirs will not be entitled to extract any thing therefrom ; unless the testator had expressly declared at the time he made the legacy, that he made it in favour both of the legatee and his heirs,

LAW 28.

By what expressions a man may give a legacy, which is called in Latin de legatis tertio.

By *legatis tertio* in Latin, is meant in common speech, that provision of the law which prescribes the expressions by which legacies may be made. And we say that legacies may be made in wills or codicils by any expressions that are intelligible, suitable and convenient to designate clearly the things which the testator intended to bequeath ; for if he express himself otherwise, the legacy will not be valid : as where he intends to bequeath gold to any one, and should call it brass, believing that gold was known by that name ; in that case, the legacy will not be valid, though the legatee should wish to prove that the testator's intention was to bequeath him gold and not brass. And so we say it would be with respect to all other things that have general names by which men every where call them, such as silver, wine, bread, cloth, garments and other similar things. For if the testator err with respect to the name of any of these things, calling it by any other than its proper name, believing that he gave it its right name, the legacy will not be valid. But it is different with respect to the things which have pro-

per names, as men have. For notwithstanding the testator err with respect to the name of any one, calling him by another name than his own, believing that he gave him his right name, yet the legacy will be valid and would not be affected by the error, if the intention of the testator, as to the person, be proved. We further say that where the testator, in bequeathing a legacy, use such words as these: "I order and desire that such a one should have such a thing; or it is my will or I think proper that he should have it;" or should say to the heir: "I suppose that you will give such a thing to such a person; or I trust to your good faith that you will do it;" or if he should say: "I wish my heir to do such a thing;" for if the testator use any of these or other similar expressions by which his intention or will may be understood, the legacy will be valid.

LAW 29.

Whether or not a legacy left to the choice of the heir be valid.

If the testator, when he bequeaths a legacy, should express himself in the following terms: "I leave to such a one such a thing, if my heir should think it right that he should have it;" or if he should say: "I leave it to the option of my heir to give such a one such a thing, if he think proper that he should have it," the legacy made in either of these ways, will have effect, unless the heir should shew some good reason why he would not give it. But if the testator should say: "I bequeath such a one such a thing, if my heir should be willing or think proper to give it;" in that case, it

will be at the option of the heir to deliver or refuse the legacy. For it is to be presumed that the testator, by using such expressions, intended to leave the matter entirely to the choice of the heir. Yet if the testator should say : “ I bequeath such a one, one thousand maravadis, if such other person (mentioning both of them by name) should consent thereto ;” such legacy would not be valid, in as much as it is made in favour of one and left at the will of another. The ancient sages have therefore said that legacies and the institution of heirs ought to be determined by the will of the testator, and not left to the choice of another person. But if the testator should say : “ I bequeath one thousand maravadis to such a one, if such other person (whom he mentions by name) should do some certain thing ;” although the doing of such thing should depend upon the will of this other, the legacy will nevertheless be valid, if the thing mentioned by him should be performed.

LAW 30.

Whether a legacy be valid where the testator says : “ I order my heir to give to such a one so many maravadis or such a thing, whenever he shall choose to do so.”

If the testator in bequeathing a legacy should say : “ I give to such a one, one thousand maravadis, to be paid to him when my heir choose to do it ;” if in that case, the heir should die, without having paid the legacy, during his life, or without having fixed a day at which his heir should pay it, then he who inherited from the testator’s heir, will be bound to pay it immediately, on obtaining possession of the estate, in as much

as the person from whom he inherited, had made no opposition thereto, during his life. But if the testator should express himself thus: "I bequeath to such a one, one hundred maravadis, if he choose to take them;" such legacy will be valid: but if the legatee should not, during his life, declare that he would accept the legacy, then his heir would have no right whatever to claim the same.

LAW 31.

That legacies may be made unconditionally and at a certain day.

The testator may bequeath a legacy purely and unconditionally, that is to say without any condition whatsoever; as if he should say: "I bequeath such a one so many maravadis or such a thing;" and he may make it to take effect on, or after a certain day; as if he should say: "I order so many maravadis to be given to such a one on next St. John Baptist's day;" or if he should say: "I order that they be given to him after that day." A legacy may be likewise made under a condition, as when the testator says: "I give such a one so many maravadis, provided he do such a thing. We further say that if the testator in bequeathing a legacy, should express himself thus: "I order that a thousand maravadis be given to such a one, when he shall be fourteen years of age;" if then the legatee should arrive at that age, the legacy will be valid, but if he die before that time, his heir cannot claim, nor will he be entitled to it. But there are cases wherein a legacy made

by such expressions would be valid, although the condition should not be accomplished; as if the testator should say: "I order that such a one, my slave, be emancipated, when my son shall be fourteen years of age;" for although the son should not arrive at that age, nor the condition be accomplished, yet the slave would be enfranchised by the reason of the favour which is shown to liberty.

LAW 32.

That the validity of legacies ought to be adjudged by the laws of this book, although the testator should forbid it.

Testators can make no other legacies than those which are to be adjudged according to our laws. Therefore, although they should have ordered that their legacies should be carried into effect notwithstanding the laws, yet if they be contrary to law or made in a manner in which they ought not to be, they will not be valid, but ought to be annulled and adjudged according to this code. Likewise, if the testator should order that his body or bones should be disposed of, or his burial made in a manner contrary to law or the customs of the country, or in a way injurious to his reputation or dishonourable to his relations, he ought not to be obeyed, and the person to whom he had given a legacy, under the condition of complying with his wish, will be entitled to the legacy though he should not comply with the same. (1)

(1) *R. l. 13, tit. 6, b. 5.*

LAW 33.

That a legacy made to several persons is valid, and in what manner it ought to be divided.

A thing may be given as a legacy to one or more persons. And when it is given to several persons, whether jointly or separately, the legacy will be valid and ought to be equally divided among them. And if one of them should die before the testator, or renounce his share of the legacy while living, or should not, for some other reason, take the legacy; in that case, his share will accrue to all the other legatees, as is above said. (a) A legacy is made jointly where the testator says: "I bequeath to such and such persons, expressly naming each of them, whatever may be their number, so many maravadis or such a thing. And the same thing may be separately bequeathed to several persons, where the testator says: "I bequeath my vineyard to such a one," and should afterwards say in the same will, "that he bequeaths the same vineyard to another person and afterwards to another person again," expressly naming each of them; then the thing ought to be equally divided among all of them, as above said.

(a) C. art. 194 & 195, p. 250.

LAW 34.

That legacies ought to be given either by will or codicil, and that the right of property therein passes to the heirs of the legatees.

All legacies may be bequeathed by a will regularly made, or by a writing executed before five witnesses, called in Latin *codicillum*, as we have said in the title on wills, (a) unless where they are given by the father or grandfather to the son or grandson, as is above said in the same title. We also say that the property in the thing bequeathed passes to the legatee immediately on the death of the testator. And although he should die before the testator's heir had entered upon the estate, or before he had himself taken possession of the legacy, nevertheless his heir who inherits his estate, will be entitled to it. But this law applies only where the legacy is made purely and unconditionally, or to take effect at a certain day, as it would be otherwise if it were made under a condition. For then if the legatee die before the condition be accomplished, the legacy will not be valid, nor can the legatee's heirs claim it, but it will go to the heir of the testator, unless the thing had been jointly bequeathed to the legatee together with another person, for in that case, the co-legatee would be entitled to the legacy, and not the heir of the testator, if the condition should be afterwards accomplished. (1)

[No other part of this law in force.]

(a) The testator can dispose of moveable effects by codicil, but not of real property. C. art. 81, p. 226.

(1) C. art. 140, p. 238.—*ibid*, art. 189, 190, p. 250.

LAW 35.

That the legacy which the testator gives to one whom he believed to be living, will not be valid if the legatee were dead at the time.

If the testator bequeath a legacy to any one whom he believes to be living, when in truth he was dead at the time, it will not be valid, nor can the legatee's heirs claim it. So it would be if the legatee were living at the time the legacy was made, but should die before the testator. (1)

[No other part of this law in force.]

LAW 36.

That the legatee has the choice either to accept or refuse the legacy.

The legatee has the choice either to accept or refuse the whole of the legacy, but not to take a part of it only and reject the other. This may happen when a specific thing or several things comprehended under the same name, are bequeathed to any one; as where the testator bequeaths a sheepfold with all its appurtenances. For although in this or all other similar legacies, many things are included, yet it is considered as but one legacy, and therefore the legatee ought to take or refuse the whole. But if the legatee happen to die leaving several heirs, then each of them may take his share of the thing bequeathed, although the other or

(1) C. art. 188, p. 250.

others would not take their part, whether the legacy consists of one thing or many. And if it consist of several distinct things, made to one legatee only, he may take which of them he pleases and refuse the others, unless where the testator had bequeathed two things, the one under some incumbrance and the other not. For if the legatee should wish to take the thing which he may immediately enjoy and refuse the other, he cannot do it. But he shall, on the contrary, take or refuse both; as where the testator bequeaths fifty maravadis and a slave to any one, requiring the legatee to enfranchise him. For if the legatee should wish to take the maravadis and not to enfranchise the slave, he shall have neither the one nor the other: nevertheless the slave would, in such case, be immediately entitled to his freedom by operation of law, in the same manner as if he had been enfranchised by the legatee.

LAW 37.

That the heir ought to deliver the thing bequeathed to the legatee.

The heir ought to deliver to the legatee the thing bequeathed by the testator, together with all its appurtenances; as where he bequeaths a lot of ground and afterwards builds a house or other edifice upon it: for then the legatee will be entitled to the house as well as to the lot. And so it would be where he had bequeathed a field which was afterwards augmented by the inundation of a river in its vicinity, or to which something had been added, as trees or a vineyard planted on it. We likewise say the legatee ought to have

the fruits of the thing bequeathed from the day the heir accepts of the succession either expressly or tacitly. (1) (a)

[No other part of this law in force.] (b)

LAW 38.

That the judge ought to give time to the heir, if he cannot immediately deliver to the legatee the thing bequeathed.

If the heir acknowledge in court that he is bound to deliver a legacy which was bequeathed to any one, and he be not able to deliver it immediately, the judge before whom the demand is made, ought to grant him a reasonable time for that purpose.

[No other part of this law in force.] (c)

LAW 39.

That the testator may revoke the legacies he has made.

The testator may, at his option, revoke any legacy he has made, either by a regular will or any other writing whatever. If made by a regular will, he may revoke it even by another writing executed before five witnesses, called in Latin *codicillus*; or he may revoke it, either by cancelling the writing containing it himself, or causing it to be done by another. But if it be can-

(1) C. art. 144, 145, p. 240.

(a) But now the fruits are due only from the day the legacy is demanded, or delivered. C. art. 140, p. 238.

(b) C. art. 140, p. 240.

(c) C. art. 140, 141 & 147, p. 238 & 240.

celled by another without his order or knowledge, the legacy will nevertheless be valid, if it can be still read, or if it can be proved by five witnesses that the legacy had been bequeathed. (1)

LAW 40.

Whether or not the legacy be revoked, where the testator afterwards alienates the thing bequeathed.

If the testator, during his life, make a donation to any one of a thing which he had bequeathed by will to another, the legacy will be void, as it ought to be hence presumed, that he had changed his mind. (a)

[No other part of this law in force.]

LAW 41.

That the legacy is revoked, if the thing bequeathed should be lost or die.

If the specific thing bequeathed to any one by the testator, should afterwards die or be lost, without the fault of the heir, the legacy will be revoked and the heir will not be bound to give it. But if doubts should arise whether it had been lost through the fault of the heir or transported elsewhere, or secreted with his knowledge ; he will be bound to give security to deliver it to the legatee, in case it should afterwards appear, or be found. And we say that if it be lost through

(1) C. art. 182 & 184. p. 248 & 250.

(a) So if the thing bequeathed should be sold by the testator. C. art. 187, p. 250.

the fault of the heir, by his not taking care of it himself, or causing it to be done, as of his own things; or if it be lost, while he knowingly delays to deliver it, either through his unwillingness, or neglect to do it; in that case, he will be bound to pay its value to the legatee, unless the legacy consisted of a slave, whom the heir having afterwards found with his wife or daughter, had killed: For then he will not be bound to give the legacy, nor pay any thing therefor. (1)

LAW 42.

Whether or not the legacy is revoked, when it consists of wool, timber or other similar things which the testator afterwards converts into any fabric, or work.

If the testator bequeath wool or timber to any one, and before he dies, converts the wool into cloth or uses the timber in the construction of a house, ship or other edifice, the legacy will be thereby revoked, as by such conversion it ought to be presumed, that he intended to revoke the legacy. We also say that if the testator bequeath a cart or carriage to any one, the legatee will be also entitled to the beast by which it is usually drawn. But if the beast should afterwards die during the life of the testator, the legacy will be revoked, unless the testator should put another in its place, for then the legatee will be entitled to the legacy. (a)

(1) C art. 191, p. 250.

(a) It is questionable whether the latter part of this law is still in force. See C. art. 144, p. 240.

LAW 43.

That the legacy is revoked, if the legatee afterwards acquire the property of the thing bequeathed.

If a man receive by way of donation, the same thing which any person had bequeathed to him, whether it had been given to him by the testator, or by any one else, he cannot then claim it in virtue of the will. We moreover say that if the legatee of a thing by a will or codicil, afterwards acquire it, by purchase or exchange of any one who has it in possession, he may then claim its estimated value from the testator's heir, who will be bound to pay it.

[No other part of this law in force.]

LAW 44.

Whether or not the legacy be valid which is made of a thing by the last wills of two persons.

[Not in force.] (a)

LAW 45.

That the heir is not bound to deliver but once the thing which is several times bequeathed in the same will.

If the testator bequeath to any one the same thing several times, in the same will, as a house, a vineyard or other specific thing, the heir will not be bound to deliver it but once. But if he had bequeathed to any one several times in the same will, a certain quan-

(a) This law is abrogated, as one of the testators must necessarily bequeath a thing not belonging to him. C. art. 147, p. 240.

tity of maravadis or of other things that can be counted, weighed or measured, if then the legatee can prove that it was the intention of the testator, to increase the legacy by so repeating it several times, he will be entitled to each sum or quantity mentioned in the will, but if he be unable to prove such intention, he cannot claim but one of them. But if the testator bequeath a certain quantity of maravadis to any person by one will, and afterwards make another will or other writing called in Latin *codicillus*, by which he bequeaths to him, the same sum again, it ought to be presumed that the testator intended to give the legacy twice over, unless the heir can prove that he intended to give it only once.

LAW 46.

If the testator bequeath his slave to any one, so that the legatee may make use of his services, he will not be understood to have given the property of the slave.

If the testator bequeath a legacy to any one by saying : “ I order that my slave shall serve such a one ; ” he is not understood thereby to transfer the property in the slave to the legatee, but only his services, during the legatee’s life, so that after his death, the slave will revert to the heir of the testator.

LAW 47.

If the testator bequeath to any one, the writing containing the obligation of a debt due him, he is understood to bequeath the debt itself.

If the testator bequeath to any one the writing containing the obligation of a debt due him, (a) and it be such as to establish the debt, he will be thereby presumed to have bequeathed the debt itself mentioned in the writing. We likewise say that if the testator owe any one a certain sum of money, and say in his will: "that he orders some other person who is his debtor, to pay his creditor the sum he owes;" by such a legacy as this, it is not understood that the creditor of the testator would have a right to demand the money of his debtor, but he may require the heir of the testator to compel him to pay the same, and the heir will be bound accordingly to do it.

LAW 48.

At what time and at what place a legacy may be demanded,

A man sometimes bequeaths certain specific things; as where he says: "I give to such a one, my slave of such a name or my horse of such a colour, or any other particular thing, designating it so that it can be identified with certainty," in that case the legatee may demand the delivery of the thing of the heir immediately he enters upon the testator's estate, in three different

(a) According to the opinion of Lopez, this law applies only to writings executed under private signatures.

places; either at the domicil of the heir, or in the place where the greater part of the testator's estate is situated or wherever the thing is found. (a) And the delivery must be made in either of these places, where the demand is made, unless a particular one had been designated for that purpose by the testator; for then it must be made there accordingly. We likewise say that if the heir should fraudulently transport the thing bequeathed, from one place to another, in order to prejudice the legatee, he shall, on the proof of such fact, return it at his own cost, to the place from which it had been taken, and deliver it to the legatee. The same rule ought to be observed, with respect to all other specific things bequeathed by the testator. But with regard to things which are bequeathed generally; as where the testator says: "I give to such a one a slave or a horse, not designating what slave or horse, or if he bequeath a certain quantity of any thing which can be counted, weighed or measured; such legacy, we say, may be demanded at the domicil of the heir, or at the place where the greater part of the testator's estate is situated, or in any other place whatsoever, where the heir has begun to pay the legacies, or in the place where the testator ordered it to be delivered. And we finally say, that it ought to be delivered at the time and in the manner in which the testator had ordered. And all suits respecting legacies ought to be determined by the judges before whom they are brought summarily and without any delay whatever.

(a) Query if it would not be now necessary to make the demand at the domicil of the heir?

TITLES

Of the Spanish Laws, and of the Civil Code, which relate
to the title of LAS SIETE PARTIDAS, on testamentary
executors.

Recopilacion de Castilla, b. 5. tit. 4.

Civil Code, b. 3, tit. 2. chap. 6. sect. 6.

OF TESTAMENTARY EXECUTORS.

What is meant by testamentary executors ; in what respect they are useful, and in what man- ner they are appointed, - - - - -	LAW 1
What is the power which the testamentary execu- tor has of paying the legacies mentioned in the will, and how they are to be paid, - - - - -	2
That executors ought to comply with the wish of the deceased and not their own, - - - - -	3
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Within what time the testamentary executor ought to carry the will of the deceased into effect, - - - - -	6
Who can compel the testamentary executors to carry the will of the deceased into effect, when they neglect to do it, and who may be appointed in their place, - - - - -	7
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TITLE X.

Of testamentary executors ; that they must pay the legacies mentioned in the will.

LAW 1.

What is meant by testamentary executors, in what respect they are useful, and in what manner they are appointed.

Though testamentary executors are called by different names, as *cabeçaleros, e testamentarios, e man-sessores*, nevertheless their duties are the same : they are called in Latin, *fidei commissarios*, because the testator entrusts the execution of his will to their good faith and honesty. They are of great advantage, when they perform the duties of their offices faithfully, as by their agency the legacies contained in a will, are more speedily paid. And they may be appointed, either when they are in the presence of the testator, or when they are absent. (1)

LAW 2.

What power the testamentary executor has of paying the legacies mentioned in the will, and how they are to be paid.

The testamentary executor has the right to give and deliver the legacies mentioned in the will, in the manner prescribed by the testator ; and he may demand and recover the things composing the legacies,

(1) C. art. 163 & 164, n. 244.

whether they be in the power of the heir of the deceased or of another person. But if the heirs suspect that the executors will not deliver the legacies to the legatees, they ought to require security of them, that their delivery may be the more certain, according to what is contained in the will. But if the executors be unsuspected persons, such as friars and monks, no security ought to be required of them, nor will they be bound to give any : for it is to be presumed that men of that description will act with fidelity. (1)

LAW 3.

That executors ought to comply with the wish of the deceased, and not with their own.

If the testator order that certain specific things belonging to him or a certain sum of money be given to certain persons, and leave all the rest of his estate in the hands of some one, whom he appoints his executor, authorizing him to distribute it among the poor at his discretion: such executor could not give any more to either of the persons designated, than had been prescribed by the testator, notwithstanding he should discover that some of them were very poor, and that it would be proper to give them more than had been bequeathed to them : yet he may divide the other part of the estate which the testator had left in his power, among the persons not designated, and who are in want, accordingly as he may think proper.

(1) *R. ll. 5, 6 & 7, tit. 4, b. 5.—C. art. 175, p. 248.*

LAW 4.

In what cases the testamentary executor may demand the estate of the deceased, either in or out of court.

There are four particular cases in which the testamentary executor may demand the estate of the deceased, either in or out of court, that he may comply with his will, notwithstanding the heir should oppose the same. The first is, where the legacy is made through motives of piety or charity. The second, where the testator bequeaths any thing to the executor, conjointly with another person. The third, where the legacy was given for the purpose of furnishing subsistence to orphans or any other persons whatever. The fourth, where the testator declares, that he gives full power to his testamentary executors to demand his estate, either in or out of court, that they may pay the legacies. Except in these four cases, testamentary executors cannot demand the estate of the deceased for the purpose of paying the legacies. But every one to whom any thing had been bequeathed by the will, may claim his part from the person whom he finds in the possession of the estate of the deceased. And the distinction made in this law, is understood with respect to all other laws which speak of the powers of testamentary executors. (1)

(1) C. art. 167 & 168, *pl.* 244.

LAW 5.

Who may pay the legacies given for the purpose of redeeming captives: if the testator should not leave a testamentary executor with such powers.

[Not in force.]

LAW 6.

Within what time the testamentary executor ought to carry the will of the deceased into effect.

If the testator should leave several testamentary executors, they ought all of them, if they can, to unite together in order to carry his will into effect, in the manner and within the time prescribed by him. And if he should not have fixed any specific day or time at which it was to be carried into effect, then they ought to endeavour to do it immediately on the death of the testator, without any further delay or pretence whatsoever. And if they meet with such great impediments that they cannot carry it into execution immediately, they ought to endeavour to do it, at all events, within one year at farthest, after the death of the testator. But if it happen that all the executors could not, or were unwilling to act, then whatever two, or one of them may do, will be valid, notwithstanding the others had no agency in it. (1)

(1) C. art. 173, p. 246.—*ibid*, art. 177, p. 248.

LAW 7.

Who can compel the testamentary executors to carry the will of the deceased into effect, when they neglect to do it, and who may be appointed in their place for that purpose.

The bishops, each in his diocese, may compel testamentary executors to carry the will of the deceased into execution, if they should be negligent or unwilling to do it, or should act maliciously therein. And we moreover say, that any person whatever may denounce their misconduct to the bishop, as it would be an act of piety to do so. And if the executors should be unwilling to pay the legacies of the deceased, the bishop may compel them thereto, or appoint other executors to do it in their place. And so we say it would be, if a man should not appoint a testamentary executor, to carry his will into effect; that the bishop in whose diocese it happened, ought to cause it to be done, if the heir of the deceased should be unwilling to do it: this they ought to do, inasmuch as it would be a work of religion and piety. (a)

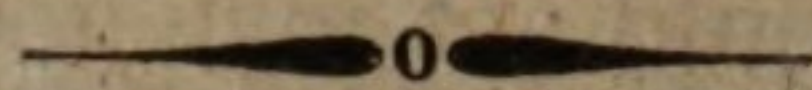
LAW 8.

What penalty testamentary executors shall incur, who maliciously delay the payment of the legacies.

If the testamentary executor be unwilling to pay the legacies left in his hands, either through malice or neglect, and he be on that account, after having been

(a) The powers given to bishops by this law, are now vested in the judges of the court of probates.

admonished to pay them, removed from his office by a judgment; he will lose the part of the estate to which he was entitled by the will, unless he were the son of the testator, for as such, he would not lose the legal portion of his father's estate to which he has a natural right, according to what we have said in law seventeenth of the title on wills.



TITLE XI.

That legacies may be diminished to the portion called in Latin, falcidia, or debitum bonorum subsidium, or trebellianica.

[Not in force.] (1)

(1) C. art. 40, p. 218,—*ibid*, art. 138, p. 238.

TITLES

Of the Roman and Spanish Laws and of the Civil Code
which relate to the title of LAS SIETE PARTIDAS on
Codicils.

Digest lib. 29. tit. 7. - - - - - *De jure codicillorum.*

Institutes lib. 2. tit. 25. - - - - - *De codicillis.*

Code lib. 6. tit. 36. - - - - - *De codicillis.*

Civil Code b. 3. tit. 2. chap. 6.

OF CODICILS.

What is meant by a codicil ; in what respect it is
advantageous ; who can make it, in what man-
ner and concerning what things, - - - - - **LAW 1**

That an heir cannot be lawfully instituted by a
codicil, - - - - - **2.**

What difference there is between a will and a
codicil, and how the latter may be revoked, - **3**

TITLE XII.

*Of the instruments of writing which men execute at
the time of their death, called in Latin codicillus.*

LAW 1.

*What is meant by a codicil ; in what respect it is advantage-
ous, who can make it, in what manner, and concerning what
things.*

By *codicillus* in Latin, is meant in common speech,
a sort of short writing which men make, either after

or before they have made their wills. Great advantages arise from it, as a man may thereby increase or diminish the legacies contained in his will; and every male person of fourteen years of age, and every female of twelve years, may make a codicil, provided they are not among those who are prohibited therefrom, according to what we said in the title of wills. (1) (a)

[No other part of this law in force.]

LAW 2.

That an heir cannot be lawfully instituted by a codicil.

An heir cannot be lawfully instituted by a codicil: wherefore, if the testator institute an heir by will, and afterwards impose some condition upon him in his codicil, or attempt to disinherit him by it, the heir will not be prejudiced thereby, nor will he lose either the whole or part of the estate, or be obliged to comply with the condition imposed by the codicil. But if the testator should declare in his codicil, that the person whom he had instituted heir in his will, had committed some fault, mentioning it, by which he did not deserve to have the estate; the heir will be prejudiced by such declaration, as he will lose the estate, if the offence be proved upon him. (2)

(1) C. art. 83, p. 226.

(a) But now, by the civil code, every minor, whether male or female, must be sixteen years old, to dispose *mortis causa*.

(2) C. art. 117, p. 232.

LAW 3.

What difference there is between a will and a codicil, and how the latter may be revoked.

A man may make several codicils, and the one will not be revoked by the other, unless he expressly declare that he wishes the first should not have effect. We likewise say that a codicil is not revoked by the subsequent birth of a child : but with respect to wills it is otherwise ; for the first will is revoked by the second, or by the subsequent birth of a child born to the testator, as we have said in the title concerning wills. (1)

[No other part of this law in force.]

(1) C. art. 183, 184, 185 & 186, p. 248 & 250.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of **LAS SIETE PARTIDAS**, on
intestate estates.

Digest lib. 37. tit. 1.	- -	<i>De bonorum possessionibus.</i>
Institutes lib. 3. tit. 1.	- -	<i>De hæreditatibus quæ ab in-</i> <i>testato deferuntur.</i>
Institutes lib. 3. tit. 10.	- -	<i>De bonorum possessionibus.</i>
Code lib. 6. tit. 12. (a)	- -	<i>De bonorum possessione con-</i> <i>tra tabulas, &c.</i>
Novels Coll. 9. tit. 1.	- - -	<i>De hæredibus ab intestato</i> <i>venientibus.</i>
Domat's Civil Law, part 2. b. 1.		
Leyes del Estilo Law, 241.		
Recopilacion de Castilla, b. 5. tit. 8.		
Civil Code, b. 3. tit. 1.		

OF INTESTATE ESTATES.

In how many ways a man may die intestate, - -	LAW 1
How many degrees of relationship there are, - -	2
That if the father or grandfather die intestate, the son or grandson will inherit his estate, - - -	3
That fathers and grandfathers inherit the estates of their sons and grandsons when the latter die intestate, - - - - -	4
That brothers and other relations of the trans- verse line, may inherit from one another when they die intestate, - - - - -	5
How brothers of the whole blood may inherit, and	

(a) See Code, lib. 6, tit. 13, 14, 15, 17, 18, 19, 55, 58 & 59.

also who may inherit from him who dies intestate, - - - - -	6
What portion of the estate of the husband who is rich, can be inherited by his wife who is poor, if she had married him without a dowry and should not have the means of living, - - - -	7
When the legitimate child can inherit the estate of his father who died intestate, or the father the estate of his legitimate child, - - - -	8
That although the father may leave a legitimate wife, his natural son will not be thereby prevented from having his part of the estate, - -	9
Who are the children that are neither legitimate nor natural, and who cannot inherit the estates of their fathers, - - - - -	10
Who are the illegitimate children that can inherit from their mothers, - - - - -	11
In what manner natural brothers may inherit among themselves, - - - - -	12

TITLE XIII.

Of the estates which a man may acquire by reason of his relationship, when the owner of them dies intestate.

LAW 1.

In how many ways a man may die intestate.

Ab intestato are Latin words, which signify in common speech, that a man dies without making a will: this may happen in four ways. The first is, where a man dies without making a will. The second, where he makes an incomplete will, not observing the neces-

sary formalities, according to what we have said in the title of wills. The third, where the testator makes a will which is revoked by the subsequent birth of a child, who had not been mentioned therein. The fourth is, where he makes a complete will, in which he institutes an heir who, being unwilling to accept the estate, renounces it. (1)

[No other part of this law in force.]

LAW 2.

How many degrees of relationship there are.

There are three lines of relationship. The first is that of the descendants, as the children and grandchildren, and those who descend in the direct line. The second is that of the ascendants, as the father and grandfather and other ascendants. The third is the collateral line, as the brothers and uncles, and those who are born of them. We shall speak of each of these in the subsequent laws, and show in what manner they will inherit from each other, when any of them die intestate. (2)

LAW 3.

That if the father or grandfather die intestate, the son or grandson will inherit his estate.

If the father or grandfather, or any other ascendant in the direct line, die intestate, the child or grandchild

(1) *R. l. 1, tit. 8, b. 5—C. art. 1, p. 144.*

(2) *C. art. 12, p. 146.*

of the deceased, whether male or female, will inherit his estate, notwithstanding he may have a brother, or other near relations in the transverse line. But we say that where a man dies intestate, leaving a son, together with a grandson, the latter being the child of his deceased son or daughter, the child and grandchild will inherit his estate by equal portion. And the grandson will not be prejudiced by the proximity of his uncle's relationship to the deceased, because the rule of law, that the nearest relation of a person who dies intestate, will inherit his estate, takes place only where the deceased leaves no descendants. We likewise say, that if there be several grandchildren, born of the same father, they will all inherit in his place, together with the uncle, and will take the same portion of their grandfather's estate, as their father himself would have been entitled to, were he living. And if any one die intestate, leaving a grandson, the child of one of his sons who is already dead, and three other grandchildren, or more, the children of another son who is also dead, the first grandson would alone inherit as great a portion of his grandfather's estate, as all his cousins together: because, whether there be many or few of them, they stand in the place of their father, and inherit all that he would have inherited, were he living. (1)

(1) C. art. 19, p. 148. — *ibid*, art. 3, 27, 29 & 42, p. 150 & 154.

LAW 4.

That fathers and grandfathers may inherit the estates of their sons and grandsons, when the latter die intestate.

[Not in force.] (a)

LAW 5.

That brothers and other relations of the transverse line, may inherit from one another when they die intestate.

We have already shown in what manner ascendants and descendants inherit from one another, when any of them die intestate. We will now show how those who are related in the transverse line, ought to inherit among themselves; as the brothers, uncles and other collateral relations, who die intestate. And we say that if any person die, without having made a will, leaving no relations, either in the ascending or descending line, but leaving a brother or sister, whether on the father or mother's side, and a nephew, the son of such brother or sister who is already dead: then the brother and the nephew will inherit the estate of the deceased, by equal portions. And although there should be two or more nephews, born of the brother or sister of the deceased, they will take but half of the estate, which they will divide among themselves in equal portions and by heads. But if the deceased have neither ascendants nor descendants, but leaves nephews from two deceased brothers, whether of the father or

(a) Abrogated by Recop. Cast. l. 1, tit. 8, b. 5.—and C. art. 30, p. 150. Now the ascendants inherit from their descendants by preference to the relations in the transverse line.

the mother's side, such nephews will inherit the estate of their uncle, dividing it among themselves, in equal portions and by heads. And we finally say, that if the deceased have other brothers, who are related to him on the father or mother's side only, then neither they nor their children shall inherit his estate together with his brothers of the whole blood, or their children, if they should be dead. (1)

LAW 6.

How brothers of the whole blood may inherit; and also who may inherit from him who dies intestate.

If a person die intestate, leaving one brother on the father's side and another on the mother's side, and leaving no other relation who can inherit from him, either on the ascending or descending line, then we say that the brother related on the father's side, will inherit all the estate of the deceased which descended to him from his father; and his brother on the mother's side, will inherit all the estate which the deceased derived from his mother; and both of the brothers will inherit by equal portions, the estate which the deceased may have acquired in any other way. And we moreover say, that if any one die intestate, leaving neither ascendants nor descendants in the direct line, nor brothers or nephews; then his nearest relation, within the tenth degree, will inherit the whole of his estate. And if no such relation exist, and the de-

(1) *R. l.* 12, *tit.* 8, *b.* 5.—*C. art.* 21, 22, 23, 32, 33, 35, 36, 37, 38 and 39, p. 148, 152 & 154,

ceased leave a legitimate wife, she will inherit the whole of his estate ; and we say that the husband will inherit from his wife in like circumstances. But if the deceased, who dies, without leaving any relations, were not married, then the whole of his estate will belong to the king's chamber. (1)

LAW 7.

What portion of the estate of the husband who is rich, can be inherited by his wife who is poor, when she married without a dowry, and should not have the means of living.

Men are sometimes content to marry women who are poor and without a dowry : it is therefore but just and proper, that since they loved and honoured them through life, they should not leave them destitute at their death. The ancient sages have therefore thought fit to ordain, that if the husband should not leave such wife, the means of living independently (*bien e honestamente*), and she should not possess them herself, then she may inherit one fourth of the estate, notwithstanding he should leave children : but such fourth part, ought not to exceed one hundred pounds of gold, however great may be the estate of the deceased. (a) But if such wife should possess in her own right, the means of living decently (*honestamente*), then she will not have any claim to the estate of the deceased, on account of such fourth part.

(1) *C. art.* 40, 42, 43, 45, 50 & 51, *p.* 154.

(a) By the civil code, the sum is not limited. *C. art.* 55, *p.* 334.

LAW 8.

When the illegitimate child can inherit the estate of his father who dies intestate, or the father the estate of his illegitimate child.

[Not in force.] (a)

LAW 9.

That although the father may leave a legitimate wife, his natural son will not be thereby prevented from having his part of the estate.

[Not in force.] (b)

LAW 10.

Who are the children that are neither legitimate nor natural, and who cannot inherit the estates of their fathers.

Any person, born from an incestuous and adulterous connexion, or in fornication, cannot be called a natural child, nor can he inherit any portion of his father's estate. And if his father should give him any thing, his other legitimate children may revoke the donation or legacy : and if there be no legitimate children, then the revocation may be made by the brothers, or grandfather or grandmother of the deceased. (1)

[No other part of this law in force.]

(a) Altered by the civil code. C. art. 45, p. 154.—ibid, art. 48, p. 156.

(b) Altered by the civil code, art. 45, p. 154, 156.

(1) R. l, 7, tit. 8, b. 5.—C. art. 46, p. 156.

LAW 11.

Who are the illegitimate children that cannot inherit from their mothers.

[Not in force] (a)

LAW 12.

In what manner natural brothers may inherit among themselves.

If a natural child, not born in lawful marriage, should die intestate, leaving neither children nor grandchildren, nor mother; then his brothers on the mother's side, will take the whole of his estate; and if he should have other brothers on the father's side, they will inherit nothing whatever. And this because the brothers on the mother's side are certain, while those on the father's side are doubtful. But if the deceased should leave natural brothers on the father's side only, and none on the mother's side; then they would inherit the whole of his estate, as they would be his nearest relations; unless he should leave a legitimate brother on his father's side, for then such brother would have a better right to his estate than his other natural brothers from the same father. We also say, that natural children cannot inherit the estate of the legitimate children of their father, nor of his other relations; but with respect to the relations on the mother's side who die intestate, they may inherit from them, if they should be the nearest of kin. (1) (b)

(a) Altered by the civil code, art. 44, p. 154.

(1) C art. 49, p. 156.

(b) This last provision is repealed by the code. art. 47, p. 156.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
the delivery of estates.

Digest lib. 5. tit. 3. - - - *De hæreditatis petitione.*
Code lib. 3. tit. 31. - - - *De hæreditatis petitione. (a)*

OF THE DELIVERY OF ESTATES.

What is meant by delivery, how many kinds there are, and to whom it is advantageous, - -	LAW 1
How the delivery of an estate ought to be made to the heir, and by whose orders, - - - - -	2
What the judge ought to do, when two heirs ap- pear, both of whom exhibit wills of the deceased, by which they are instituted heirs, - - - -	3
That he who is in possession of the estate, ought to deliver it to the heir, - - - - -	4
That he who has possession of an estate to which he has no right, ought to pay for what he alien- ates, - - - - -	5
That where a person holds an estate, without a right thereto, and any of the beasts or cattle die, he will be bound to pay their value to the heirs, - - - - -	6
After what length of time the heir will lose the estate, if he should not claim it, - - - - -	7

(a) There are no titles in the Spanish laws and in the civil code
upon this subject.

TITLE XIV.

That the estate of the deceased ought to be delivered to the heir, whether he claim it in virtue of a will or of his relationship.

LAW 1.

What is meant by delivery; how many kinds there are, and to whom it is advantageous.

By delivery (*entrega*) is meant the corporeal possession which the heir receives of the property of a succession that belongs to him. And he may demand it in two ways. The first is, where he simply demands possession of the estate. The second, where he demands both the possession and property. Such delivery is very advantageous to the heir; for when it is legally made, he immediately acquires the property of the estate: and moreover the condition of one in possession of a thing, is always better than that of him who claims it, as we have said in the third partida of this book, in the laws which treat of that matter, under the title of possession.

LAW 2.

How the delivery of an estate, ought to be made to the heir, and by whose order.

If the heir appear before the judge, and present him the will by which he is instituted heir, and it be perfect and complete, as it ought to be, being neither erased (*rayada*) nor cancelled; then the judge shall, if

the heir require it, put him into possession of the estate, and of every thing else which the testator had at the time of his death, notwithstanding the person then in possession of the estate should allege that the will was forged, or that the testator had not a right to make it, or should make some other similar objection; unless he should offer to prove immediately what he alleges, without any delay whatever: for then the judge ought to withhold the delivery, and hear and receive the proof produced in that respect.

[No other part of this law in force.]

LAW 3.

What the judge ought to do when two heirs appear, both of whom exhibit wills of the deceased, by which they are instituted heirs.

When any one appears before a judge, exhibiting a will by which he is instituted heir to another person, and prays that he may be put in possession of his estate, according to what we have said in the preceding law: if then some one else come before the same judge, and allege that he has a better right to the estate, because he had been subsequently instituted heir by the testator, or for some other cause which he alleges, and which he says he wishes immediately to prove; the judge ought thereupon to examine both wills and hear the reasonings of the parties, and to put him in possession of the estate who shows the best right to it. And if both of them establish equal rights to the estate of the deceased, both of them should be put equally in possession of it.

LAW 4.

That he who is in possession of the estate, ought to deliver it to the heir.

When the judge delivers the estate of the deceased to the person entitled to it, he ought also to deliver to him its fruits. But in this respect, a distinction must be made: for if the person in possession of the estate, had consumed the fruits he had gathered or obtained from it, he will not be bound to pay their estimated value, if he held the estate in good faith, believing it to be his own. But he would be bound to restore those he had not consumed, if any remained at the time the suit was commenced, concerning the estate, or when the judgment was rendered: nevertheless he may deduct from such fruits, the expenses he had incurred in gathering them, or in cultivating the estate; for according to the ancient sages, those only are called fruits which remain to him who had gathered them, after deducting the expenses they had cost him. We also say, that if the person in possession of the estate of any one deceased, should be negligent and inattentive, and should not improve and cultivate it, as he ought to do; if he possessed it in good faith, believing that it was his own, or that he had a lawful right to retain it; then we say that if he should be obliged to deliver the estate to the heir, by the order of the judge, he will not be bound to render an account of the fruits which he might have gathered from it, if he had cultivated it; for, since he held it in good faith, it is not to be presumed that he intended to defraud any one, by not cultivating it, but that he acted as a man sometimes

does, who neglects to cultivate his own lands, because he is not able to do it, or for some other reason. But if he held it in bad faith, and were evicted by a judgment of court; then he would be obliged to deliver it up, together with all the fruits he had gathered from it, those he had consumed, and which he then has, and even the rents and fruits which he might have gathered from the estate, had he cultivated it, in as much as he had no right to possess it, and had acted in bad faith. Yet he may deduct from such fruits, the expenses he had incurred in gathering them, or in ameliorating and improving the estate.

LAW 5.

That he who has possession of an estate to which he has no right, ought to pay for what he alienates.

If a man be in possession of an estate belonging to another, and he be condemned by a judgment to restore it, he ought to deliver it up to the successful party, together with every thing appertaining to it. But if, while he were in possession of the estate in good faith, believing it to be his own, he should sell or alienate any thing belonging to it; then we say that if the thing can be recovered back, for the same or for a less price, than he had received for it, he would be bound to purchase and restore it to the real heir, by whom he was vanquished in the suit; and if he cannot obtain it, he will not be bound to give in its stead, a greater price than what he had received. But if he had held the estate in bad faith, he will be bound to restore the thing he had sold, if he can obtain it in any

manner whatever : and if he cannot obtain it, he ought to pay the successful party, all that it was worth over and above what he had received for it.

LAW 6.

That where a person holds an estate without any right thereto, and any of the beasts or cattle die, he will be bound to pay their value to the heirs.

If a man be sued for an estate, which he holds in bad faith, and some of the beasts or cattle belonging thereto, die after issue joined in the suit, he will be bound to pay the heir for them, notwithstanding they die from disease or from some other cause, in case he should be cast in the suit. But if the loss had happened to the beast, or to other things belonging to the estate, before the suit was begun, he will not be bound to pay therefor, if it happened without his fault. But if a person thus cast in a suit, possessed the estate in good faith, believing he had a right to hold it ; then he would not be bound to pay for any loss that might happen in the manner above mentioned. For it would be enough for the heir to recover the estate, together with the things found existing upon it, at the time judgment was rendered against the possessor, who had not a right to retain it.

LAW 7.

After what length of time, the heir will lose his estate, if he should not claim it.

One man may possess another's estate in three ways. The first is, where he holds it, believing he has a right

to it, when in truth, he has not: such would be the case, where he had bought it of a person who had no right to it, but who believed that it was his own: or where any one had been instituted heir by a will which was afterwards revoked, without his knowledge. In this case, we say that if he who claims the estate, should not demand it judicially of the person in possession, within ten years, he being in the country, or within twenty, being out of it, he would afterwards lose his right thereto, and the person in possession would acquire the estate. The second is, where he who holds the property or estate of the deceased, does it in virtue of some title, but well knows that he has no right whatever thereto: as where he had bought it of a person who well knew that it did not belong to him, and that he had no right to sell it. The third is, where he knows with certainty that he has no right to it, and is moreover unable to show any title by which he holds it. If in either of these two last mentioned cases, he who is entitled to the estate, should not demand it of the person in possession, within thirty years, being informed of his title, and able to make the demand; then we say, he will, by his neglect, lose all the right he had thereto, and it will be acquired by him who held it during that time. Yet a minor, under twenty-five years of age, cannot lose, by the lapse of thirty years, the right which he has to an estate, while his minority continues.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of **LAS SIETE PARTIDAS**, on
partition of estates.

Digest lib. 10. tit. 2. - - - - - *Familiæ erciscundæ.*

Institutes lib. 3. tit. 36. - - - - - *Familiæ erciscundæ.*

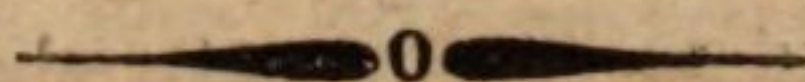
Domat's Civil Law, part 2. b. 1. tit. 4.

Civil Code b. 3. tit. 1. chap. 8.

OF PARTITION OF ESTATES.

What is meant by partition, and what advantages arise from it, - - - - -	LAW 1
Who can demand a partition ; and of whom ; what are the things that can or cannot be divided, and in what manner, - - - - -	2
What are the gains which one brother is bound to divide with another, - - - - -	3
Whether or not the donations made by the father to any of his children, during his life, ought to be deducted from their shares of the estate, -	4
What are the gains which one brother is not bound to divide with another, - - - - -	5
That the dowry or <i>arras</i> which the father receives for his son or daughter, ought not to be brought into partition with the other brothers, - - -	6
Which of the heirs ought to retain the privileges and papers of the estate, when the testator had given no order in that respect, - - - - -	7
That he who holds the privileges and papers of the estate, by order of the testator, ought to show them to the other heirs, whenever they shall have need of them, - - - - -	8

That when the partition is made before the judge, or by his order, the heirs ought to give security mutually to indemnify one another, for the por- tions of the estate which fall to them respect- ively, - - - - -	LAW 9
What power the judge has, before whom the par- tition is brought, - - - - -	10



TITLE XV.

*How the estate ought to be divided among the heirs,
after they are put in possession of it : and likewise
how it ought to be measured out when disputes arise
among them in that respect.*

LAW 1.

What is meant by partition, and what advantage arises from it.

Partition is the division which men make among themselves, of things which belong to them in common, either by inheritance or under any other title. Great advantages arise from it, when it is made according to law : for the disputes which often arise among men, concerning the things they possess in common, are thereby prevented, and each one is contented with his share, when he receives it, and can then cultivate it with greater advantage, and derive greater profit from it. (1)

(1) *C. art. 157, p. 184.*

LAW 2.

Who can demand a partition ; of whom ; what are the things that can, or cannot be divided, and in what manner.

Each one of the heirs who has a right to succeed to the estate of the deceased, may require of the others, to make a partition of it, among themselves. This partition may be made, accordingly as the testator had directed in his will ; or if he had given no order in this respect, then the estate ought to be divided, in the manner prescribed in the laws of the title which treats of that matter. But if, among the effects of the testator, any thing pernicious should be found, as poison, deleterious herbs, destructive drugs, books or writings on incantation, or other things which men are prohibited from using, they ought not to be divided, but should, on the contrary, be burnt and destroyed. We likewise say, that if among the effects of the deceased, any thing should be found which had been unlawfully obtained ; as if he were a person who received, or had in his possession any of the king's rents, and had purloined any part of them ; or if he had stolen, robbed, or taken any thing from another person by force, or had acquired it by usury, these ought not to be divided among the heirs, but shall, on the contrary, to be restored to the owners, or to those who inherit from them. And if it cannot be certainly known whose they are, then they ought to be appropriated to pious uses. (1)

[No other part of this law in force.]

(2) C. art. 156, p. 184.

LAW 3.

What are the gains which one brother is bound to divide with another.

We likewise say that the dowry, *arras* or donation which the father gave in marriage to any of his sons, ought to be deducted from the part of the estate coming to the donee, unless the father had expressly said, at the time of the donation, or in his will, that he did not intend it should be so deducted. This applies where the brothers only inherit the estate of their father or mother; for if a stranger had been instituted heir, together with them, then they will not be obliged to bring such dowry or donation into partition, nor to deduct it from their shares of the estate. (1)

LAW 4.

Whether or not the donations made by the father to any of his children, during his life, ought to be deducted from their shares of the estate.

If the father, during his life, make a donation to his son who is under his power, and does not revoke it before his death; the son will have the donation free and exclusively, and will not be bound to account for it in the partition of the estate with his brothers, (a) unless the father had given something in marriage to either of the other brothers, as we have said in the preceding law: for then if such brother be willing to account to

(1) C. art. 208, *fi.* 196.

(a) This provision of the law is altered by the civil code. C. art. 193, p. 192.

the others for what he so received in marriage ; in that case, we say that he who had received the donation from his father, in his life time, must account for it in like manner : and this because of the equality that ought to be observed between them. But if the father should make so great a donation to one of his sons, as that the other brothers cannot get their legal portion, out of what remains ; then we say that the donation ought to be so much diminished, as to leave the other sons their legal portion. (1)

LAW 5.

What are the gains which one brother is not bound to divide with another.

One brother is not bound to divide with another, the gains which he had acquired of himself, and which are called *castrense vel quasi castrense peculium*, or those which are called *adventitias*, according to what we have said in the title which treats of the power that the father has over his children. For these gains, whether acquired by the son, when he is under the power of his father or not, ought to remain to him, and his brothers will have no right whatever to them. We also say that books which the father gives to one of his sons, or the expenses he incurs for him in educating him, in the schools, ought not to be accounted for to the other brothers, in the partition of the estate. We moreover say, that the expenses which the father incurs in furnishing either of his sons, with arms, a

(1) C. art. 197, *fi.* 192.

horse and other things necessary for the cavalry, ought not to be deducted from his part of the estate; and this because those who take up arms or study science, do not do it, solely for their own advantage, but likewise for the common good of the nation, and the country in which they live. (1)

LAW 6.

That the dowry, or arras, which the father receives for the son or daughter, ought not to be brought into partition with the other brothers.

If a dowry, or *arras*, be given by any person to the father, on account of the marriage of his son or daughter; what is thus given will remain to such son or daughter, and the other brothers cannot claim or have any part of it; and this because the charges of the marriage are to be supported by the dowry, which cannot therefore be brought into partition. But if the father should give a dowry with his daughter or son, or make a donation to his son's wife; then what we have said in the third law of this title, ought to be observed. We likewise say that if the son contract any debts, in the life time of his father, by his orders, or which turned to his profit, they ought to be paid in common, out of the estate of his father. We further say that if either of the heirs, gather the fruits of the estate, he will be bound to bring them into partition with the other brothers. And if he incur any expenses on account of the estate, or in gathering the fruits,

(1) C. art. 207, p. 196.

he ought to be reimbursed for the same, and the remainder shall be divided in the manner above prescribed. (1)

LAW 7.

Which of the heirs ought to retain the privileges (preuillejos) and papers of the state, when the testator had given no order in that respect.

Where there are privileges (*preuillejos*) or papers (*cartas*) found among the effects of the deceased ; if there are many heirs, they ought to be kept in deposit by him who inherits the greatest portion of the estate ; and he shall give copies of them to the other heirs, and show them the originals, when they have need of them. And if the heirs should have equal portion of the estate, he among them who is the most honoured, and who is the oldest and enjoys the best reputation, ought to take them in deposit. But if there should be a woman among them, notwithstanding she should be more honoured, or enjoy a higher rank than the men, yet she cannot, on that account, take the papers of the estate, but they ought to be delivered to one of the men. And if all that take equal parts of the estate, were equally honoured, as well as equal in all other things, then they ought to cast lots to determine which of them shall keep them, and they ought to be taken care of by the one on whom the lot falls, who shall furnish copies of them to the others, as we have above said. And if they should not happen to agree in this respect, then they ought to put them in deposit in the

(1) C. art. 208, *h.* 196.

vestry of some church, where they can remain, until they shall agree. (1)

LAW 8.

That he who holds the privileges and papers of the estate, by order of the testator, ought to show them to the other heirs, whenever they have need of them.

If the testator expressly order one of his heirs, to keep under his care, the privileges and title papers belonging to the estate; we say that before they are delivered to him, he ought to give copies of them to the other heir mentioned in the will; and he ought, moreover, to give security that he will exhibit the originals, either in or out of court, whenever they may be wanted.

[No other part of this law in force.]

LAW 9.

That when the partition is made before the judge, or by his order, the heirs ought to give security mutually to indemnify one another, for the portions of the estate which fall to them respectively.

When the heirs come before the judge to divide the estate which they possess in common, he ought, *ex officio*, to require them, after the partition is made, to give security to indemnify each other, for any loss they may sustain, in case a third person should claim any thing, falling to their respective shares, and exhibit a right to the whole or a part thereof, and establish

(1) C. art. 189, p. 190.

it by a judgment of court. (*a*) But if the father, or the testator himself, had during his life, made such a partition among the heirs, as should be made after his death; if then either of them lose, by a judgment of court, any thing falling to his share, the others would not be bound to indemnify him, in any manner whatever, for the same. (1)

LAW 10.

What power the judge has, before whom the suit for partition is brought.

The judge before whom the heirs demand the partition of the estate, has the right to order it to be made in the manner he shall conceive to be most suitable and advantageous to them. And therefore, if he discover that a house or vineyard which is to be divided among them, would be much injured by being cut up into many parts, he may adjudicate the whole of it, to one or more of them, whom he may require to pay to each of the other heirs respectively, as many maravadis as their shares in such house or vineyard would have been estimated at, had it been divided. So we say it would be with respect to other things of a nature not to be divided, as a horse or other animal; for its value ought to be estimated and given to one of them, who shall be ordered to pay the other heirs their shares in money, according to the estimation, and they will be

(*a*) Licet ista cautio non præstetur adhuc agatur de Evictione. Gregorio Lopez.

(1) C. art. 238, ff. 204.

bound to comply with the order of the judge in this respect. (a) We likewise say that if any contention should arise between the heirs, or with the neighbouring proprietors, concerning the limits or boundaries of any field or other land belonging to the estate, so that they cannot agree as to the partition of it; then in order to settle the dispute, the judge ought to go in person to the fields or lands and examine the matter about which the disagreement arose, and if he find ancient boundaries there, by which he can settle the matter, he ought to do that which he shall think for the best, in order that each one may obtain his rights: And if he find the boundaries and limits to be intermixed, so that those of one estate run into the other, and that disputes may hence arise, he ought to order them to be removed and placed in such way as to prevent all contentions. And he shall condemn him whose lands are increased by the change of limits, to pay to the other the value of the land that is taken from him thereby. And the heirs, as well as all others who come into the partition, ought to obey the orders of the judge in that respect, and if any of them refuse to do it, he may impose upon them any penalty at his discretion, until he shall compel them to obey.

(a) Now, when things are by their nature indivisible, or when they cannot be conveniently partaken, they must be sold at public auction. C. art. 171, p. 188.

TITLES

Of the Roman and Spanish Laws and of the Civil Code
which relate to the title of **LAS SIETE PARTIDAS** on
guardianship of minors.

Digest, lib. 26, tit. 1. - - - - *De tutelis.*
Institutes, lib. 1, tit. 13. - - - *De tutelis. (a).*
Domat's Civil Law, part 1. b. 2. tit. 1 & 2.
Fuero juzgo, b. 4, tit. 3.
Fuero Viejo, b. 5, tit. 4.
Fuero Real, b. 3, tit. 7.
Leyes del Estilo, ll. 2 & 225.
Civil Code, b. 1, tit. 8.

OF THE GUARDIANSHIP OF MINORS.

What is meant by guardianship, called in Latin <i>tutela</i> , and to whom it is to be given, - - -	LAW 1
How many sorts of guardians there are, - - -	2
That the father or grandfather may appoint a guardian over his son or grandson, - - -	3
Who can be appointed a guardian to the person and property of a minor, and by whose order it is done, - - - - -	4
That the mother cannot have the guardianship of her children, if she marry after the death of their father, - - - - -	5
That the mother may, by her will, appoint guar- dians to her children, whom she leaves as her heirs, - - - - -	6

(a) Digest, lib. 26, from tit. 1 to 10, inclusively—ibid, lib. 46, tit. 6—
Institutes, lib. 1, from tit. 13 to 25, inclusively—Code, lib. 5, from tit.
28 to 75, inclusively,

That the father may appoint his slave as guardian to his children: and that he ought to declare the name of the guardian with certainty, that there may be no doubt in that respect, - - -	LAW 7
That a guardian whom the father appoints over his natural children, cannot exercise the guardianship, without the order of the judge, - -	8
That when the father or grandfather does not appoint by will, a guardian to his children or grandchildren, then the nearest relations will be their guardians, - - - - -	9
That he who enfranchises his minor slave, ought to be the guardian of his person and property,	10
That where there are several guardians who cannot agree in administering the estate of the minor, one of them may do it, - - - - -	11
Who are the judges that ought to appoint guardians to minors who have none, - - - - -	12
Who they are to whom those guardians ought to be appointed, that are called in Latin <i>curatores</i> , - - - - -	13
Who they are that cannot be guardians of others,	14
In what manner guardians ought to administer the estates of their pupils, - - - - -	15
That guardians ought to teach their minors to read and write, - - - - -	16
That the guardian ought to sue for the minor, and answer to suits that are brought against him,	17
That guardians ought not to alienate the property of their minors, - - - - -	18
In what place, and with whom, the minor ought to be reared up, - - - - -	19
How much of the minor's estate, ought to be given to him for his maintenance and that of his family, - - - - -	20

For how long a time the office and duties of guardian of minors ought to endure, and how guardians ought to render an account of the estate of their minors, - - - - - LAW 21

TITLE XVI.

How minors, and the estates they inherit after the death of their fathers, ought to be taken care of.

LAW 1.

What is meant by guardianship, called in Latin tutela, and to whom it is to be given.

By *tutela* in Latin, is meant in common speech, the guardianship which is given and conferred over minors of free condition, who are under fourteen years of age, when they are males, and under twelve years, when they are females, as being incapable and not knowing how to defend themselves. This guardianship is by law conferred over such minors, although they should neither wish nor demand it. But if a suit be brought against a minor of that age, touching his freedom, the judge may appoint him a guardian, to defend his liberty and property. We likewise say that a guardian ought to be appointed generally, to take care of the personal property of the minor, and not for a particular thing, or one suit only. (1)

(1) C. art. 1, p. 58.

LAW 2.

How many sorts of guardianship there are.

There are three ways in which guardians may be appointed over minors whose parents are dead. The first is, where a father appoints a guardian to his child, by will, who is called in Latin, *tutor testamentarius*, that is, a guardian appointed by the will of another. The second, where the father does not appoint by will a guardian to his child, who has relations: for then the law selects the nearest relation for his guardian, who is called in Latin *tutor legitimus*, that is to say, a guardian appointed by operation of law. The third is, where the father appoints no guardian to his child, who has no near relations to take the guardianship; for then the judge of the place, ought to appoint some good, upright man, as guardian, who is called in Latin *tutor dativus*, that is to say, a guardian appointed at the discretion of the judge. And as there is a difference between these guardians, we shall speak of each of them, beginning with him who is appointed by the father over his children, or his other descendants. (1)

(1) C. art. 2, p. 58.

LAW 3.

That the father or grandfather may appoint a guardian over his son or grandson.

The father may appoint a guardian to his children who are already born, and under his power, and also to those who are yet in the mother's womb. (1)

[No other part of this law in force.]

LAW 4.

Who can be appointed a guardian to the person and property of a minor, and by whose order it is done.

He who is appointed guardian to a minor, should be neither dumb, deaf, a lunatic, a prodigal, nor a person of bad morals. He ought, moreover, to be twenty-five years of age, a male and not a female; unless it were the mother or grandmother of the minor. For if either of these promise before the king or the judge of the place where the minors are, that she will not marry, while she has them under her guardianship, and will also renounce the protection (*defension*) which the law grants to women, in prohibiting them from obligating themselves for others, she may then be appointed guardian to her children or grandchildren, as is above said. And the reason why she is prohibited from marrying, while she has her children under her guardianship, is, that she might, through the great love she has for her new husband, not take such good care

(1) C. art. 11, p. 60.

of their persons and property, or do something that might greatly prejudice them. And moreover, if she should not renounce such protection, men would hesitate in dealing, or making contracts with her, although it might be necessary for her to act, for the guardianship of the children and for the increase and advantage of their estate : And the guardian ought to be appointed by the order of the father, or grandfather, or by the operation of law, as on account of relationship, or by order of the judge, as we have above said. (1)

LAW 5.

That the mother cannot have the guardianship of her children, if she marry after the death of their father.

If the mother marry, while she has her children under her guardianship, as we have said in the preceding law; the judge of the place where she is married, ought immediately to remove the children from her guardianship and power, (a) and put them under that of their nearest relation who is a good, unsuspected man, and not one of those prohibited by the laws of this book from being guardians. And if the judge find that the mother owes any thing to the children, on account of the administration she had of their estate, or in any other way whatever, then all her property, as well as that of her husband, will remain bound therefor.

(1) C. art. 9, 10, n. 58 & 60.—*ibid.*, art. 47, n. 66.

(a) This provision of the law is altered by the code, art. 10, p. 60.

LAW 6.

That the mother may, by her will, appoint guardians to her children whom she leaves as her heirs.

The mother who makes a will, by which she institutes her children, for her heirs, who have no father, may appoint them a guardian in the same will. But such guardian cannot make any use of the estate of the children, unless he be confirmed by the judge of the place where the estate is : And the judge ought to confirm him, and grant him the guardianship, unless he were a person prohibited by the laws of this book from acting in that capacity. But if the mother should not institute her child as her heir, she cannot appoint him a guardian, notwithstanding she should, in some other way, leave him a portion of her estate. Yet if she should happen to appoint one, and the judge be willing to confirm him, the appointment will be valid, but not otherwise. (a)

LAW 7.

That the father may appoint his slave as guardian to his children : and that he ought to declare the name of the guardian with certainty, that there may be no doubt in that respect.

We likewise say, that when the father appoints a guardian to his children, he ought to name and designate him, that it may be known with certainty who he is ; for if he should nominate one person as guardian,

(a) Altered by the civil code, art. 10, p. 60.

and there happen to be another of the same name ; if then it cannot be known with certainty which of them he meant, neither of them would be appointed.

[No other part of this law in force.]

LAW 8.

That a guardian, whom the father appoints over his natural children, cannot exercise the guardianship, without the order of the judge.

That where the father institutes the child of his concubine, as his heir, he may appoint by will a guardian over his person and property, in the same manner, as if he were the child of his legitimate wife. But such guardian cannot intermeddle with the guardianship of the person or property of the minor, unless he be confirmed by the judge of the place. We also say that the guardians mentioned in the will, may be appointed simply and for a certain time, or under condition, accordingly as the testator shall think proper. (1)

[No other part of this law in force.]

LAW 9.

That when the father or grandfather does not appoint by will, a guardian to his children or grandchildren, then their nearest relation will be their guardian.

If a man who has children, die intestate, without appointing any guardian to them ; or if he make a will without leaving them under the guardianship of any

(1) C. art. 11, p. 60,

one; or if he leave them a guardian who dies before he does himself, and the children have no mother or grandmother, then we ordain that their nearest relations of the same degree, shall be the guardians of their person and property: and such guardians as these, are what are called legitimate guardians. But we say, that, before they take possession of the estate of the minors, they ought to give good and sufficient securities, to the judge of the place, who shall promise and obligate themselves, for the guardians, that they will faithfully take care of, and administer the property of the minors and the fruits it produces. And finally, guardians ought to swear that they will do every thing to the advantage of the minors whom they have under their guardianship, and that they will not undertake or do any thing that shall turn to their prejudice, but will take faithful care of their persons and estates. Yet if the minors should have a mother or grandmother who wishes to have the guardianship of them and their property; then we say that the mother shall have it in preference to all other relations, provided she be a good and trusty woman. And if she should not wish to take the guardianship, then it may be given to their grandmother. (1)

[No other part of this law in force.]

(1) *C. art. 15, 18, p. 60.—ibid, art. 53 & 55, p. 68.*

LAW 10.

That he who enfranchises his minor slave, ought to be the guardian of his person and property.

We also say that if the father emancipate his child who is a minor under fourteen years of age, he ought to retain him and all his property under his guardianship. And if he should die before the child be of age, and the latter have a brother twenty-five years old, he shall be his guardian instead of his father.

[No other part of this law in force.]

LAW 11.

That where there are several guardians who cannot agree in administering the estate of the minor, one of them may do it.

Where there are several guardians to a minor, and they disagree as to the manner in which any thing is to be done, which they are bound to perform, relating to the guardianship of the minor, and his property; in that case, we say, that one of them may declare to the judge that he is willing to give security and obligate himself to perform what the others had to do, provided they should think it proper; otherwise that one of them might undertake it, and if they agree in this respect, then the judge ought to take of him such security, as we prescribed in the preceding law. But if they should disagree so that each of them be willing to obligate himself and take the guardianship of the property of the minor, then the judge ought to choose among them, the one whom he thinks will best acquit himself of that duty, most to the advantage of the minor, taking

such security of him as is above mentioned, and confer on him alone the guardianship of the minor and the administration of his estate.

LAW 12.

Who are the judges that ought to appoint guardians to minors that have none.

If a minor under fourteen years of age, be left without a guardian, his father not having appointed him one by will, nor having any near relation who is willing to be his guardian ; then the mother and the other relations who will inherit from the minor, if he should die intestate, may and ought to petition the judge of the place, to appoint him some good and sufficient man for a guardian, and whom he conceives will take the charge upon himself more for the sake of the minor, than his own. And if they should not petition the judge to appoint him a guardian as is above said, they will thereby lose the right they would have to inherit his estate, if he should die without a will. And we moreover say, that if his relations should neglect to have a guardian appointed for him, or if he should have no relations to cause it to be done, then his friends, or any person whatever, may petition the judge to appoint him such a guardian as will take care of his estate ; and the judge ought to choose him one himself, and not do it through any other person. And the guardian spoken of in this law, is called *dativus*, that is, a guardian appointed by the authority of the judge. And the judge of the place where the minor has the greater part of his estate, may be required to

make the appointment, and he ought to do it accordingly, whether the minor be present or not, and though opposition should be made to it. But if the judge who appoints the guardian, has not the competent authority to do so, as is above said, then the guardian cannot take charge of the minor. And the power of such guardians, will endure until the minor is fourteen years of age, if it be a male, and twelve if it be a female, whether they were appointed by will or otherwise. And after the minors have attained to these ages, the judge ought to appoint them another guardian, called in Latin *curator*, requiring of him the same security as is given by tutors, and the curator will have the guardianship of the minor, until he is twenty-five years of age. (1)

[No other part of this law in force.]

LAW 13.

Who they are to whom those guardians ought to be appointed, that are called in Latin, curatores.

They are called *curatores* in Latin, who are appointed as guardians to minors above fourteen years of age and under twenty-five, with the consent of such minors; and also those who are appointed guardians to madmen and lunatics above twenty-five years of age. But such minors who are of sound mind, cannot be compelled to accept guardians against their wish, unless they bring suit, or should be sued by any one; for then the judge may appoint them guardians. We

(1) *C.* art. 20, 22, 23, 24, 25, 27, 28, p. 62, 64.—*ibid.* art. 1, p. 58.

moreover say, that a curator cannot be appointed by will : but if one should be named in the will, and the judge conceive that he would be of advantage to the minor, he ought to confirm him. We also say, that if a minor have one guardian, another ought not to be appointed to him ; unless the one he has, administers his estate badly, or be so much occupied with his own affairs, that he cannot attend to those of the minor, or should be infirm, or should be about to undertake a distant journey : for then another guardian may be appointed to the minor, called in Latin *curator*, until the first shall be restored to health, or return from his journey. (1)

LAW 14.

Who they are that cannot be guardians of others.

Neither a bishop, monk, or other member of a religious order, can be the guardian of a minor : for they are obliged to perform worship in the churches, by which they are prevented from attending to the persons and property of the minors. But other secular ecclesiastics, whether they be priests or not, may act as guardians to minors, on account of their relationship to them. And they ought to present themselves before the ordinary judges of the place, within four months after they knew that their relation was dead, leaving children without a guardian, and declare that they wish to become the guardians of the minor children of their deceased relation ; after which they may

(1) C. art. 78, 81, 83, 84, 86, p. 72, 74.

take them under their guardianship, and administer their estates. But the debtors of the minors cannot become their guardians, unless their fathers had appointed them by will, nor can he be the guardian of a minor, who is obligated towards the king, on account of his having been employed in superintending his household estates or revenues, of which he has an account to render ; nor a military man, while he does not dwell in his house, but is in the service of the king or other lord, or engaged in the army ; nor a person who is dumb, deaf, or who is prevented by infirmity or in any manner, so that he cannot officiate to the advantage of the minor. (1)

LAW 15.

In what manner guardians ought to administer the estates of their pupils.

Guardians ought to administer the estates of the minors whom they have under their care, in the following manner. They ought, first of all, to cause to be made out, a written account of all the estate of the minor, under the authority of the judge of the place, by the hand of a notary public. This account is called in Latin *inventarium*. It ought to contain copies of all the privileges and writings belonging to the estate of the minor. If the guardian should fail to make such inventory, the judge of the place ought to take away from him the guardianship of the minor and his property, as being a suspected person, unless he can

(1) C. art. 47, p. 66.

show some good cause for not making it. Yet the judge ought to order him to make it, without any further delay : and after it is made, the guardian ought to repair the houses of the minor, to prevent their falling, to cause his lands to be cultivated, and the cattle to be reared up which he finds on the estate of the deceased. This he ought to do honestly and in good faith. (1)

LAW 16.

That guardians ought to teach their minors to read and write.

The guardian ought to endeavour to teach good morals to the minor whom he has under his guardianship, and to learn him to read and write ; after which he ought to place him in a situation to learn and practise the trade or profession most suitable to his dispositions and fortune. He ought, moreover, to take care of him and administer to his wants, furnishing him with food, clothing, and all other necessary things, accordingly as he shall think his duty requires ; always taking care to do it in proportion to the amount of the estate he had received from him. (2)

LAW 17.

That the guardian ought to sue for the minor, and answer to suits that are brought against him.

The guardian ought, in the name of the minor, to sue for, and defend his rights in every cause which he

(1) C. art. 52, 54.

(2) C. art. 60, p. 70.

institutes, or is instituted against him. And if there be two or more guardians, one of them may do it, in the absence of the others. And if judgment be rendered in such suit against the guardian, the property of the minor under his guardianship, ought to be delivered up, and not that of the guardian. We likewise say that the minor cannot enter into any contract or agreement with any one, by which he obligates any part of his estate, unless with the authorization of his guardian; and if he should do it to his prejudice, the contract will not be valid. But if another person should make a contract with him, by selling him any thing, or obligating himself towards him for something advantageous to the minor, the contract will be valid. And the authorization which the guardian gives in the name of the minor, either in or out of court, ought to be given in person, and not by his mandatary or letter, otherwise it will not be valid. (1)

[No other part of this law in force.]

LAW 18.

That guardians ought not to alienate the property of their minors.

Guardians ought neither to give away, sell, nor alienate any immoveable thing belonging to the minor, unless to pay the debts left by his father, or to marry one of his sisters or the minor himself, or for some other legal, indispensable cause: and even then, not

(1) C. art. 61, ft. 70.

without the authorization of the judge, which the latter ought to grant, if he conceives that the alienation is to be made for any of the above mentioned purposes. (a)

[No other part of this law in force.]

LAW 19.

In what place, and with whom, the minor ought to be reared up.

The minor ought to be reared up in the place, and with the persons pointed out by the will of his father or grandfather. And if neither of them, should have ordered any thing in this respect, then the judge of the place, ought to take great care to select some good man for that purpose, attached to the person and interest of the minor, and who would not have a right to inherit his estate, after his death. Yet if he should have a mother of good reputation (*buena fama*), her son may be given to her, to rear up, and she may retain him, while she remains a widow; but immediately on her marrying, the minor ought to be withdrawn from her power: for as the ancient sages have said, a woman is wont to love her new husband so much, that she may not only give him the property of her children; but may also consent to their death, for the sake of pleasing him.

(a) See the act passed by the legislature on the 20th of March, 1811. Martin's Digest, 132.

LAW 20.

How much of the minor's estate, ought to be given to him for his maintenance, and that of his family.

Minors should be maintained out of their estates, in the following manner. The judge of the place ought, in his discretion, to fix upon a certain quantity of bread, wine, and money, according to the fortune of the minor, for his maintenance, and that of his family ; always taking care that his expenses shall not exceed the rents and fruits of his estate, which ought to remain entire, if possible. But if the guardian should conceive it would be prejudicial to the minor, to discover to him his riches or poverty, and should, on that account, maintain him out of his own effects, expending for him more or less, as may be proper ; then we say he may do so, and the minor, when he becomes of age, will be bound to reimburse what has been so expended. (1)

LAW 21.

For how long a time the office and duties of guardians of minors, ought to endure ; and how guardians ought to render an account of the estates of their minors.

The office of guardian ought to endure until the minor be fourteen years of age, if a male, and twelve, if a female. It will likewise terminate by the death or banishment, of either the guardian or minor : So it would be, if either of them should be reduced to slave-

(1) C. art. 60, p. 70.

ry, or fall into a state of captivity. We moreover say, that if any one be appointed guardian for a certain time, or under a condition, his guardianship will cease, at the expiration of the time, or on the failure of the condition; and also when the guardian excuses himself therefrom, for any legal cause; or where the office is taken from him, as a suspected person. And in whichsoever of these ways, his guardianship may cease, he will be bound immediately to render a true and faithful account of all the estate of the minor, as well moveable as immoveable, and deliver the whole to him and his guardian called a *curator*: for the performance of which, the guardian, his securities, their heirs and their estates, are bound towards the minor and his heirs. (1)

[No other part of this law in force.]

(1) C. art. 1, p. 58—*ibid*, art. 30, p. 64—*ibid*, art. 69, 70, 75 & 78, p. 70 & 72.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of **LAS SIETE PARTIDAS**, on
excuses of guardians.

Digest, lib. 27, tit. 1. - - - *De excusationibus.*
Institutes, lib. 3, tit. 36. - - *De excusationibus tutorum
vel curatorum. (a)*

Domat's Civil Law, part 1, b. 1, tit. 1, sect. 7.

Civil Code b. 1. tit. 8. sect. 7.

OF THE EXCUSES OF GUARDIANS.

What is meant by excuse, - - - - -	LAW 1
For what reasons the guardian of a minor may excuse himself from the guardianship, - - -	2
That military men and teachers of sciences, may excuse themselves from being guardians to oth- er persons, - - - - -	3
Before whom, in what manner, and within what time, ought the person who is chosen as guar- dian, to excuse himself from that office, - -	4

(a) C. art. 1, p. 58—*ibid*, art. 30, p. 64—*ibid*, art. 69, 70, 75 & 78, p. 70 & 72.

TITLE XVII.

For what causes they who are selected as guardians for minors, may excuse themselves therefrom.

LAW 1.

What is meant by excuse.

Excuse, (*escusanca*), is, as it were, the giving some lawful reason in court, why he who is appointed guardian to a minor, is not bound to receive him and his estate, under his guardianship. But a minor under twenty-five years of age, who is appointed guardian, is not bound to give an excuse, in as much as persons of that age, cannot be guardians, though they should wish it.

LAW 2.

For what reasons, the guardian of a minor, may excuse himself from the guardianship.

There are certain causes for which a man may excuse himself, from being the guardian of a minor. The first is, where he has five legitimate children living. But if a man had lost one or more children out of five, in battle, in the service of religion, or the king, they may be reckoned among those that are living, and the father may, on that account, excuse himself from being guardian. So may all those who are engaged in collecting the revenues of the king, as well as his messengers, and those who are employed in the administration and execution of justice. But if either

of them had been appointed guardian to a minor, before he held such office, he cannot afterwards, on that account, excuse himself from the guardianship. We also say, that if the guardian of the minor should have to go to distant parts, in the service of the king, or by his order; or in the service, or for the common good of the country in which he lives, he ought to be excused (*devenie atender*), until his return: and during his absence, the minor, as well as his estate, ought to be put under the guardianship of a proper person, to take care of them. And when he comes back, he ought to retake the guardianship of the minor, as he had it before. We also say, that during the space of one year after his return, no other minor ought to be put under his guardianship, unless he should himself be willing to receive him. We further say, that if any important suit should arise anew, between the guardian and the minor, concerning the whole, or any considerable part of the estate of the latter; in such case, the guardian may excuse himself from the guardianship. We likewise say, that if a man have three minors under his guardianship, and should be required to take another, he may then excuse himself from receiving the fourth. Moreover, a person who is so poor, that he has no other means of gaining a subsistence than by the labour of his hands, may excuse himself in like manner; as also may he who is afflicted with an incurable infirmity, who knows not how either to read or write, if he be so simple and uninformed as not to be able to undertake the guardianship with safety: or one who has been the deadly enemy of the father of the minor, whom it is intended should be put

under his care ; that is to say, a person who had accused the father of crimes, which, if proved, would have exposed him to suffer death, or rendered him infamous ; or who had endeavoured to put him to death, in any other way, or had been his known enemy, and had never been reconciled with him. And so a person is excused from being guardian, who had instituted a suit against the father of the minor, in order to reduce him to slavery, or against whom the father had instituted one for the same purpose ; as also a person over sixteen years of age and under twenty-five. (1)

LAW 3.

That military men and teachers of science may excuse themselves from being guardians to other persons.

A military man who stays in the king's court, or in any other particular place, by his order, or for the common good of the country, may excuse himself, by reason of such service, from taking the guardianship of the minor. So may teachers of grammar, rhetoric, logic, or physic, who instruct their scholars in these sciences, in the country or in other places, by the order of the king. And so with respect to teachers of the laws, who serve the king and live with him, as his judges or counsellors ; likewise philosophers who teach natural philosophy, cannot be appointed to the guardianship of minors, against their will. We likewise say, that he who has been appointed guardian of a minor under fourteen years of age, and had kept him until

(1) C. art 30, p. 64.—*ibid.* see the laws of the 7th section, chap. 1, tit. 8, b. 1, of the Civil Code, p. 64.

he had arrived at that age, may excuse himself from taking care of him any longer. We finally say, that the husband ought not to be appointed guardian to the estate of his wife who is under age, as it is to be presumed that her love for him, would prevent her from demanding any amends for the damage or deterioration he might do to it, and that she would freely pardon him therefor. Wherefore the husband ought to petition the judge, to appoint another guardian to her estate, who might be free from all suspicion. (1)

LAW 4.

Before whom, in what manner, and within what time, ought the person who is chosen as guardian to excuse himself from that office.

A person who wishes to excuse himself from being the guardian of a minor, ought to make his excuse before the judge, within fifty days after he knew of his appointment as such, if he should be in the place where he is appointed, or in any other not more than one hundred miles distant; for then, he ought to be allowed one day, for each twenty miles, and thirty days more in addition for making his excuse. And the judge to whom it is made, ought to determine whether it be valid or not, within four months from the day the above delay began to run. And if the guardian make a lawful excuse which the judge is unwilling to receive, he may appeal from his judgment, if he conceives himself aggrieved thereby. (a)

(1) C. art. 26, p. 64.

(a) This law is altered in part by the civil code, art. 45, p. 66.

TITLES

Of the Roman and Spanish Laws and of the Civil Code
which relate to the title of **LAS SIETE PARTIDAS** con-
cerning suspected guardians.

Digest, lib. 26, tit. 10. - - - - *De suspectis tutoribus.*

Institutes, lib. 1, tit. 26. - - - *De suspectis tutoribus
vel curatoribus.*

Civil Code, b. 1, tit. 8, sect. 8.

OF SUSPECTED GUARDIANS.

For what causes, guardians ought to be removed from their guardianship, - - - - -	LAW 1
Who can accuse the guardian for his suspicious conduct; in what manner it is to be done, and before whom, - - - - -	2
That the judge may, <i>ex officio</i> , deprive a guardian of his guardianship, when he conceives it to be prejudicial to the minor, - - - - -	3
What penalty guardians deserve, when they do any injury to the estates of their minors, - -	4

TITLE XVIII.

In what cases, minors and their estates ought to be withdrawn from the hands of their guardians, on account of suspicion existing against them.

LAW 1.

For what causes, guardians ought to be removed from their guardianship.

A guardian is said to be suspicious, when he is such as that it may be presumed he will waste the estate of the minor, and teach him bad morals. And although he should be rich, and willing to give security for his administration, nevertheless the minor ought not to be left under his care, in as much as the evil intention he had of wasting his estate, will not be prevented by the suretyship. If, on the contrary, he should be poor, but of good morals, the minor ought not to be taken from him, on account of his poverty, and put under the care of another person. The other reasons for which minors may be taken from their guardians or others appointed in their places, are the following: as where any one has already been the guardian of a minor, and had administered his estate badly; or had taught him bad morals; or if it should be discovered, after he had been appointed guardian, that he was the enemy of the minor or of his relations; or if he should declare before the judge, that he had not wherewith to feed the minor, and his declaration be discovered to be false: or if he should

not make out an inventory of the minor's estate, as we have above said ; or should not defend him and his property in or out of court ; or should conceal himself, being unwilling to appear, when he knew he had been appointed guardian to the minor. (1)

LAW 2.

Who can accuse the guardian for his suspicious conduct ; in what manner it must be done, and before whom.

Every person has a right to accuse a guardian for his suspicious conduct ; and particularly the mother, grandmother, sister or nurse of the minor, is bound to do it, and any other person whatsoever, who is moved thereto, by motives of piety. But a minor, under fourteen years of age, cannot accuse his guardian, as a suspicious person, though he may do it, when he is above that age, with the advice of his parents. And each of the above mentioned persons may accuse, as well the guardian of an unborn child, as of one already born ; whether he had been appointed by will, or on account of his relationship, in which case he is called a legitimate guardian ; or had received his appointment from the judge of the place ; and such accusation against the guardian, on account of his suspicious conduct, ought to be made before the chief judge of the place where the minor's estate is situated, and in the presence of the person accused.

(1) C. art. 47, 48, 49 & 50, p. 66, 68.

LAW 3.

That the judge may, ex officio, deprive a guardian of his guardianship, when he conceives it to be prejudicial to the minor.

The judge may, *ex officio*, deprive a guardian of his guardianship, notwithstanding no one accuse him, if he sees or is informed that he administers the estate of the minor badly, no matter in what way he may have obtained his information. We likewise say, that as soon as a guardian is accused for his suspicious conduct, and the suit is begun by petition and answer, the judge ought to put the minor and his estate under the care of some good man as a deposit, (*en fieldad*,) until it is terminated.

LAW 4.

What penalty guardians deserve, when they do any injury to the estates of their minors.

If the guardian be removed from the guardianship of the minor, as a suspicious person, on account of any fraud he had committed upon his estate, he will, for ever thereafter, remain infamous, and shall also pay for the damage he had done to the minor, according to the discretion of the judge. But if he were removed, not on account of any fraud he had intentionally committed, but for his inattention and negligence in the administration of the minor's estate, he will not then become infamous: Yet another good man ought to be immediately appointed in his place, to take care

of the person and property of the minor. And we finally say, that all the reasons and suspicions, mentioned in these laws as applicable to the guardians of minors under fourteen years of age, apply likewise to other guardians who are appointed to minors above that age and under twenty-five, and who are called curators.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of **LAS SIETE PARTIDAS**, on
restitution of minors.

Digest, lib. 1, tit. 1. - - - - - *De restitutionibus in
integrum.*

Domat's Civil Law, part 1, b. 4, tit. 6.

Civil Code, b. 3, tit. 3, chap. 5, sect. 7.

OF RESTITUTION OF MINORS.

What is meant by restitution, and to whom it is
advantageous, - - - - - **LAW 1**

Who are the minors that can claim restitution, and
for what causes, - - - - - **2**

That a minor under twenty-five years of age, or
his guardian, may claim restitution for the da-
mages he sustains, when either he or his advo-
cate improperly confess or deny any thing in
court, - - - - - **3**

That a minor may excuse himself, by reason of
his age, for the offences he commits, - - - **4**

In what case a minor may annul the contracts or
agreements which had been made to his preju-
dice, - - - - - **5**

In what cases restitution ought not to be granted
in favour of the minor, - - - - - **6**

That a minor may abandon a succession which
he had taken possession of, if he conceive that
it will be disadvantageous to him, - - - **7**

Before whom a minor may demand restitution;
when, and in what manner it ought to be done, **8**

- That a minor may claim restitution of the things
which he had lost by prescription, - - - - 9
- That churches, the king and city councils, may
claim restitution for the same causes that mi-
nors can, - - - - - 10

TITLE XIX.

That minors are entitled to restitution for the loss or deterioration they sustain in their estates, by their own fault, or the fault of those under whose guardianship they are.

LAW 1.

What is meant by restitution, and to whom it is advantageous.

By *restitutio* in Latin, is meant in common speech, the demand which a minor makes of the judge, to be restored to the condition in which he was, before he had entered into some contract or agreement, which had turned to his prejudice ; or that he revoke a judgment which had been rendered against him, and put the cause in the same situation it was before. Such restitution is advantageous to minors, as they are thereby protected from any damage arising from their own imprudence, or the fraud of others.

LAW 2.

Who are the minors that can claim restitution, and for what causes.

He is called a minor who is not twenty-five years old complete, (a) whatever may be the time he falls short of that age. If it be discovered that such a minor has sustained damage from his own imprudence, through the fault of his guardian, or by the fraud of any other person; then the thing he has thereby lost, ought to be restored to him, or he shall be relieved from the damage he had sustained, on proving such loss or damage, and that he was under twenty-five years of age when he sustained it; for if he do not make such proof, nothing that had been stipulated or transacted with him or his guardian, can be annulled. (1)

LAW 3.

That a minor under twenty-five years of age, or his guardian, may claim restitution for the damages he sustains, when either he or his advocate improperly confess or deny any thing in court.

If a minor, his guardian or advocate acknowledge or deny any thing in court, by which his rights are impaired or lost, or omit to interpose any defence or other exception, by which he could have been benefited, he may petition the judge to place the cause in the situation it was before, and that his rights be, in no way,

(a) Now minority ceases at twenty-one years of age. C. art. 19, p. 10.

(1) C. art. 205, 206, 207, 208, 209, 210, 211, 212 & 214, p. 302.

prejudiced thereby ; and the judge shall do it accordingly. And with respect to the means of restitution mentioned in this law, and all others of which minors can avail themselves, we have fully treated in the third partida of this book, in the laws of the titles of plaintiff, and defendant, and of judges, which speak of that matter.

LAW 4.

That a minor may excuse himself by reason of his age, for the offences he commits.

[Not in force.]

LAW 5.

In what case a minor may annul the contracts or agreements which had been made to his prejudice.

We likewise say, that if a minor under twenty-five years of age, had been empowered by will, or in any other manner, to select any thing that had been bequeathed to him, and he be deceived in his choice, believing that he took the best, when he did not ; he may petition the judge to permit him to abandon it, that he may take the best, and the judge ought to do it accordingly. We further say that if he make any agreement or contract to his prejudice, or exchange a debt for one that was of less value, or alter his situation in any other way whatever, by which his fortune is prejudiced or his rights impaired ; he may petition the judge to annul the contract or exchange he had made to his injury, and that he restore to him whatever he had lost, in any of the forementioned ways, and the judge ought to do it, if he find that the minor

were really under twenty-five years of age, when he made the contract, and the prejudice, or injury he had thereby sustained, be also proved. But if the minor had given security for such contract, the security cannot avail himself of the restitution accorded to the minor, unless in the manner prescribed in the laws which speak of that matter under the title of suretyship.

[No other part of this law in force.]

LAW 6.

In what cases restitution ought not to be granted in favour of the minor.

If a minor fraudulently declare or acknowledge, that he is over twenty-five years of age, and from his person he appear to be so, then any contract made with him will be valid, and ought not afterwards to be annulled, although he should have been under that age at the time he made it, as the law comes to the aid of those who are defrauded, and not of those who commit the fraud. (a) We likewise say, that if a minor under twenty-five years of age, petition the judge for restitution of the thing which he had lost, or for any injury he had sustained by a contract he had made during his minority, and sentence be rendered against him, because the truth of what he alleges, does not appear, he cannot afterwards renew his demand before the same or any other judge; unless he appeal from the judgment, or show some other new reason in his

(a) This provision of the law seems abrogated by the civil code, art. 207, p. 302,

behalf, such as ought to be received. We further say, that if a minor under twenty-five years of age, bring suit, with the consent of his guardian, by which he claims any one as a slave, and judgment be rendered against him, declaring the defendant to be free; the minor cannot afterwards claim restitution against such judgment, on account of his non-age, at the time he commenced the suit: and this on account of the favour which the law shows to liberty. We moreover say, that if the contract or agreement against which the minor claims restitution, had been made in the way in which every man of good understanding and sound mind would have made it, and he had not been defrauded thereby; then it cannot be annulled, on account of his minority, at the time he entered into it: for he who claims restitution, ought always to prove two things; first, that he was a minor at the time he made the contract or agreement; the second, that he had made it to his damage or injury.

LAW 7.

That a minor may abandon a succession which he had taken possession of, if he conceive that it would be disadvantageous to him.

If a minor under twenty-five years of age, be instituted heir to an estate, which he thinks it not to his advantage to keep, he may petition the judge, to authorize him to abandon it, though he may have already entered upon it. But when this is done, the creditors of the succession ought to be present, that they may know the cause why he abandons it. And if then the

judge consider that it would be prejudicial to the minor, he ought to authorize him to abandon it, and place him in the situation he was before, having previously secured every thing belonging to the estate.

LAW 8.

Before whom a minor may demand restitution ; when, and in what manner it ought to be done.

A minor ought to demand restitution, before the ordinary judge of the place, for any damage or injury he may have sustained in his property, either by a contract which he had entered into to his prejudice, or from any of the causes mentioned in the preceding laws. And the judge ought to call before him the party against whom the demand is made, and if he find that the contract, acknowledgment, or judgment, of which the minor complains, was made or rendered to his prejudice, he ought to restore him to the condition in which he was before, so that each of the parties may retain his rights unimpaired, as he formerly possessed them. And the minor may claim such restitution, against every contract or acknowledgment (*conoscencia*), which had been contracted or made to his prejudice, either by himself, or by his guardian or advocate. Such demand for restitution may be made by the minor at any time before he is twenty-five years old complete, and even within four years afterwards : and not only may it be made within that time by the minor himself, but by his heirs likewise. (1)

(1) C. art. 204, p. 302.

LAW 9.

That a minor may claim restitution of the things which he had lost by prescription.

Prescriptio, in Latin, means in common speech, the acquisition which a man makes of any thing, by the effect of time. And although we spoke fully of that subject, in the laws of the third partida, which treat of that matter ; yet we moreover say that the prescription of twenty years or upwards, does not run against the minor who is under twenty-five years of age, nor against his property, nor can prejudice him in any manner, so as to cause him to lose any thing thereby. This ought to be understood to apply where such prescription begins to run against minors who are already born. But if, before they are born or instituted heirs, it had begun to run against those from whom they inherit, it will then run likewise against the minors, and they will be prejudiced by the same. Yet they may claim restitution for the time which run against them, while they were minors. But the prescription of thirty years and upwards, will run against and prejudice minors who are under twenty-five years of age, and above fourteen : nevertheless they may petition the judge for restitution, so as to lose nothing during the time of their minority ; and this they may do within four years thereafter, according to what is above said. (1)

(1) C. art. 56, n. 486.

LAW 10.

That churches, the king, and city councils, may claim restitution for the same causes that minors can.

As the property of the church, king, and city councils, may be lost or deteriorated by the fault of those who administer them, or by the fraud of others; it was therefore anciently ordained, that such property should enjoy the same privilege and advantage, as that of minors, under twenty-five years of age. Wherefore those who have it under their power and care, may demand restitution for the same, when it is lost by prescription, or the fraud or negligence of others, at any time within four years after the fraud or lesion is sustained. But if the lesion amount to more than half of the value of the thing sold, then amends and restitution therefor, may be demanded, at any time within thirty years, counting from the day the alienation was made.

END OF THE SIXTH PARTIDA.

HERE COMMENCES THE
SEVENTH PARTIDA

OF OUR BOOK, WHICH TREATS OF
ACCUSATIONS, OF THE CRIMES MEN COMMIT,
AND THE PUNISHMENTS THEY DESERVE FOR
THE SAME. (a)

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of **LAS SIETE PARTIDAS**, con-
cerning infamous persons.

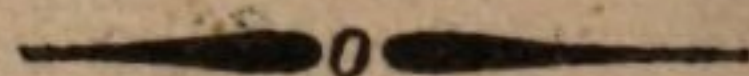
Digest, lib. 3, tit. 2. - - - *De his qui notantur infamia.*
Code, lib. 10, tit. 57. - - - *De infamibus.*
Code, lib. 2, tit. 12. - - - *Ex quibus causis infamia*
irrogatur.
Civil Code, b. 1, tit. 8, ch. 1, sect. 8, l. 47—ibid, b. 3, tit.
2, ch. 6, sect. 3, l. 105—ibid, b. 3, tit. 3, ch.
6, sect. 3, l. 248.

OF INFAMOUS PERSONS.

What is meant by character (*fama*), and infamy,
and how many kinds there are, - - - - - **LAW 1**
Of the infamy which arises from fact alone, - - - - - **2**

(a) Only those titles and parts of titles of the seventh partida that are
in force, will be translated. A list of those that are not in force will be
placed at the end of this partida.

Of the infamy which arises from the operation of law, - - - - -	LAW 6
Of infamy in law, - - - - -	4
What are the offences for which men are deemed infamous, when they have been convicted of the same, - - - - -	5
In what cases a man ceases to be infamous, - -	6
Of the effect of infamy, - - - - -	7
What penalty he deserves who wrongfully defames another, - - - - -	8



TITLE VI.

Of infamous persons.

What is meant by character, (fama,) and infamy, (enfamamiento,) and how many kinds there are.

By character, (*fama*,) is meant the good condition of a man who lives uprightly, according to law and good morals, being free from all stain or reproach. By infamy, (*disfamimento*,) is meant the blemish which affects a man's character, and is called in Latin *infamia*. There are two sorts of infamy. The one is that which arises from fact (*fecho*) only : the other arises from the operation of law, by which certain persons are rendered infamous on account of the deeds they have done.

LAW 2.

Of the infamy which arises from fact alone.

[Not in force] (a)

LAW 3.

Of the infamy which arises from the operation of law.

If a woman be, any where, found in the act of adultery with another person ; or if she intermarry by words *de presenti*, or prostitute her body before the expiration of a year after the death of her husband, (b) she will become infamous in law. So the same infamy would attach to the father, if he knowingly give his daughter in marriage, before the expiration of one year after the death of his son in law ; as also to him who knowingly marries her, unless he should do it by the order of his father or grandfather, under whose power he was : for then the infamy would fall on him who gave the order, and not upon him who contracted the marriage. And the ancient sages were determined to prohibit women from marrying, within such time, for two reasons. The first, in order that it might be known with certainty that the child born of her was the offspring of her first husband. The second, that no suspicion might arise against her, on account of her marrying so soon, that she was guilty of the death of

(a) As infamy in law only, is spoken of in the civil code, it would seem that infamy in fact is no longer to be regarded. C. art. 47, p. 66—art. 105, p. 232—art. 248, p. 312.

(b) Ten months by the civil code, art. 31, p. 32.

her former husband, as we have said in several places in the laws of this book, which treat of that matter.

[No other part of this law in force.]

LAW 4.

Of infamy in law.

Leno, in Latin, means in common speech, a pimp. If such person keep his female slaves or other women who are free, in his house, and cause them to prostitute their bodies for money, or occupies himself, in any other manner, in finding out or procuring women for other people for a reward which he receives, he will thereby become infamous. And so with respect to jugglers, mountebanks and buffoons, who exhibit themselves publicly, or sing or perform tricks for a price, in as much as they debase themselves by receiving it. (a) But those who play upon musical instruments, or sing, for their own pleasure, or that of their friends, are not infamous for that reason. We also say that they are infamous who fight with each other, or with wild beasts for money. For it is to be presumed that they who hazard their lives in that manner, for a price, would be easily induced to commit other wrongs for a reward. But where a man engages in combat with another person, not for money but in his own defence or that of his friend, or with wild beasts, in order to shew his strength, he will not, on that ac-

(a) As jugglers, mountebanks, buffoons, &c. are not prohibited from exercising their professions, it may be doubted whether this provision of the law is in force.

count, be infamous, but on the contrary, will acquire the reputation of a stout and valiant man. So also usurers are infamous, as well as those who violate contracts or obligations they have sworn to observe, and they who commit the crime against nature. In any of the above mentioned cases, a person is deemed infamous *ipso facto*, though no sentence be rendered against him to that effect, in as much as he is so declared by law.

[No other part of this law in force.]

LAW 5.

What are the offences for which men are deemed infamous, when they have been convicted of the same.

If sentence be rendered against a man by any of the ordinary judges, convicting him of treason, forgery, adultery or any other offence which he had committed, (a) he will thereby become infamous. So it would be if a man be accused of theft, robbery, fraud or tort, (*tuerto*,) which he had committed, and should agree or compromise with the person injured, giving him something, without the order of the judge, to induce him not to accuse him, or not to proceed in the accusation already made; as he is then presumed to have committed the crime of which he is accused. We likewise say that he who is condemned to pay any

(a) Si intelligas de crimine publico, planum est: Si de crimine privato, procedit in quatuor casibus; furti scilicet, vi bonorum raptorum, injuriarum, et de dolo dummodo si condemnatus suo nomine. Gregorio Lopez.

thing to his partner or to an orphan whom he had under his guardianship, or to the person to whom he was attorney in fact, or who had given him something to keep in deposit, on account of any fraud he had committed against them, will thereby become infamous; but he would not be so, if the sentence had been rendered by arbitrators. We moreover say that if a man be found in the act of committing theft, or either of the above mentioned offences, or confess them in court, or be sentenced to be whipped or to undergo any other public punishment, (a) for any crime he had committed, he will thereby become infamous.

LAW 6.

In what cases a man ceases to be infamous.

But with respect to the infamy above mentioned, arising from the punishment decreed by law, it may be effaced and taken away, by the pardon which is granted by the emperor or king. (1)

[No other part of this law in force.]

LAW 7.

Of the effect of infamy.

Infamis, in Latin, means in common speech, a man who is infamous; and such is the effect of infamy, that they who are infamous cannot obtain any of the digni-

(a) Intellige quando pœna ictus fustium or alia corporalia. Gregorio Lopez.

(1) See the laws of the tit. 10, book 8, Recop. Cast.

ties or honours which ought to be conferred on persons of good character ; and if they already enjoy any, they will lose them immediately on proof of their infamy. Therefore, an infamous person cannot be a judge or member of a city council, nor an advocate, but he may be the attorney in fact of another, or act as a guardian of minors, when the guardianship of them had been given to him by the will of the person whose heirs they are ; (a) he may also be an arbitrator, and hold other offices of which infamous persons are not declared incapable, and which are advantageous to the king, or to the corporation of any place.

[No other part of this law in force.]

LAW 8.

What penalty he deserves who wrongfully defames another.

If one man defame another, accusing him of an offence punishable with death, (b) he ought to make amends therefor, by paying in damages to the person defamed, at the discretion of the judge, according to what is said in the title on slander. But if the person defaming wish to prove the truth of what he had said, and do it accordingly, he will not incur any penalty.

(a) This provision of the law is abrogated by the civil code, art. 47, p. 66.

(b) With respect to crimes punishable by death, the defamer was subject by the Partidas to the *lex talionis*.

TITLES

Of the Roman and Spanish Laws which relate to the title
of LAS SIETE PARTIDAS on forgery.

Digest, lib. 48, tit. 10. - - - *De lege Cornelia de falsis.*

Code, lib. 9, tit. 24. - - - *Ad legem Corneliam de
falsis.*

Fuero Juzgo, b. 7, tit. 5 & 6.

Fuero Real, b. 4, tit. 7.

Ordenamiento Real, b. 8, tit. 6.

Recopilacion de Castilla, b. 8, tit. 17.

Antos Accordados, b. 8, tit. 17.

OF FORGERY.

Of the frauds which men commit by fixing false
limits, or in dividing their lands, (a) - - - **LAW 8**

TITLE VII.

Of Forgery.

LAW 8.

*Of the frauds which men commit by fixing false limits or in
dividing their lands.*

Men sometimes employ surveyors to measure out
and divide the estates which they have in the neigh-

(a) This is the only law in the title which is in force. The others
relate exclusively to the crime of forgery.

bourhood of each other, in order the better to ascertain what belongs to them respectively, or what they have bought or sold. And if any one employed to make such measure or partition, should not do it well and faithfully, but should knowingly give to either of the parties more or less than he is entitled to, he would be guilty of fraud, and he who sustains prejudice or loss thereby, may require restitution of all that the other had unjustly gained by the partition. And if he cannot obtain amends in this way, because of the insolvency of this other, or from any other cause; then he who measured it fraudulently, shall make reparation therefor, out of his own effects. We also say that if two men agree to submit their accounts to a skilful accountant chosen by themselves, and he knowingly commit an error therein, he will be guilty of fraud. And if the party who is prejudiced thereby, cannot obtain amends of the other for the loss he had thus sustained, we say that the accountant himself will be bound to make amends out of his own effects. (1)

(1) *R. l. 5, tit. 17, b. 5.—Anto 2, tit. 20, b. 8.*

TITLES

**Of the Roman and Spanish Laws which relate to the title
of LAS SIETE PARTIDAS on slander (*Deshonras*), &c.**

Digest, lib. 45, tit. 7.	- - - -	<i>De injuriis et famosis libellis.</i>
Institutes, lib. 4, tit. 4.	- - - -	<i>De injuriis.</i>
Code, lib. 9, tit. 35.	- - - -	<i>De injuriis.</i>
Domat's Civil Law, vol. 2, b. 3, tit. 11.		
Fuero Juzgo, b. 12, tit. 3.		
Fuero Real, b. 4, tit. 3.		
Leyes del Estilo, ll. 81, 85 & 131.		
Ordenamiento Real, b. 8, tit. 9.		
Recopilacion de Castilla, b. 8, tit. 10.		

OF SLANDER AND LIBELS.

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That one man may injure another by mimicing him,	- - - - -	
That they who pursue young women, whether married or unmarried, or widows who live virtuously, or send pimps or jewels to them, dishonour them,	- - - - -	5
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- Who can be injured ; who may demand amends
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- That a lord may demand reparation for the injury
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- That the heirs may demand reparation for an in-
jury received by the person from whom they
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- Of the penalty incurred by those who break the
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- That reparation may be claimed of the master for
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- That when the judge cause a man to be arrested,
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- Although an astrologer should speak ill of another,
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- That if any one, in attempting to serve his friend,
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other person, the latter cannot claim amends for
the same as for an injury done him, - - - - 18
- What are grievous injuries, called in Latin *atro-*
ces, and what are not, - - - - - 19
- What reparation ought to be made to the person
injured, - - - - - 20
- Within what time a man may demand reparation
for an injury he had received, - - - - - 21
- That the heir cannot demand reparation for an
injury done to the person from whom he inher-
its, unless the suit had been already commenced
by the deceased, - - - - - 22

TITLE IX.

Of slanders against the living or dead, by words or actions ; and of libels (famosos libellos.) (a)

LAW 1.

What is meant by slander (deshonra), and how many kinds there are.

By *injuria*, in Latin, is meant in common speech, a dishonour (*deshonra*) done to the wrong or prejudice of another person, either by word or deed. And although there are many kinds of slander (*deshonra*), yet they are all derived from two sources, either words or deeds. From words, as where a man insults or scandalizes another, in the presence of many persons, by deriding him, or calling him by opprobrious names, or by defaming him out of his presence, so that this other conceives himself dishonoured ; or by causing it to be done by other persons, as by children, or any one else whatever. From deeds (*por hecho*), as where a man speaks ill of another, before many persons, by defaming or accusing him of some crime. In such cases, the person slandered may demand reparation from the wrongdoer, whether the injury was done in, or out of his presence. But if he who slanders any one, by such or other similar language, confess the fact, and offer to prove the truth of what he has said, he will not incur any penalty, if he

(a) See the laws of the title 10, b. 8, Recop. Cast.

prove it accordingly. And this for two reasons ; the first, because he spoke the truth ; and the second, because men may be restrained from evil doing, by the shame and contempt they thereby incur.

[No other part of this law in force.]

LAW 2.

In what case a man who speaks ill of another, shall not be heard, though he should offer to prove the truth of what he had said.

Although we said in the preceding law, that they who speak ill of others, will incur no penalty, if they prove the truth of what they said ; yet there are cases in which it is not so : as where the son or grandson speak ill of, or defame his father, grandfather, or great grandfather ; or the freedman his patron ; or a person reared up, him who reared him, or him with whom he lived ; or the hired servant his master : for although others may speak ill of them for any offence they have committed, yet the persons above enumerated cannot defame or insult them, on account of the obligations they owe them ; but on the contrary we say that if they hear evil spoken of them, they ought to forbid and contradict it. We therefore ordain, that if any of these persons should defame, by words, those to whom they stand related in the manner above said, they shall suffer a penalty therefor, nor shall they be heard, though they should offer to prove the truth of what they have said.

[No other part of this law in force.]

LAW 3.

Of slandering persons by songs or verses.

One man may not only defame or dishonour another by words, but also in writing, by making songs, rhymes, or malicious libels concerning those whom he intends to defame. And this is sometimes done publicly and sometimes secretly, by throwing such malicious writings in the houses of great lords, churches, and in the public places of cities and towns, in order that they may be read by every body; by which means we conceive that they who are defamed, sustain great dishonour, and they who presume to do it, commit a great offence against the sovereign. And this sort of writing is what is called in Latin, *famosus libellus*, which means in common speech, a little book by which some one is defamed. Therefore the emperors and sages who made the ancient laws, have forbidden any one from defaming another in this manner, and ordained, that whoever shall first find such writings, shall immediately destroy them, and not show them to any other person, otherwise he would be subject to the same penalty as the author himself. They also forbid every one from presuming to sing any songs, or recite any verses or writings intended to defame or dishonour any one; and whoever contravenes this provision of law, will become infamous. What we herein say, is intended to prevent one person from defaming another in secret, or in any other manner. But if one man should wish to speak ill of another, let him accuse him of the evil or crime he had committed, before the judge, in the manner prescribed by the laws of this book.

And on proving it, he will incur no penalty, while the accused, on the other hand, will become infamous, as the law ordains. And although we said in the first law of this title, that he who defames another by words, will incur no penalty, if he prove the truth of what he said, nevertheless it is otherwise with respect to songs, rhymes, and libels, which are committed to writing. For, notwithstanding the author of these last should offer to prove the truth of what they contained, he cannot be heard, nor his proof received, because the evil which a man utters of another in writing or verses, is more hurtful than that which is contained in words only, as the remembrance of it, may be always preserved, unless the writing be lost, while that which is uttered only in words, is soon forgotten. (1)

[No other part of this law in force.]

LAW 4.

That one man may injure another by mimicing him.

Men not only injure and defame others, by uttering ill of them verbally, as by songs, rhymes, or libels, as we have said in the preceding laws, but also by maliciously mimicing and imitating their speeches or actions. We therefore say, that if one man mimic, or imitate another by words or actions, before many persons, with an intention of dishonouring or defaming him, then the person so dishonoured or defamed, may sue the other for reparation, in the same manner as if he had dishonoured or defamed him in any other way.

(1) R. see the laws of the title 10, b. 3.

LAW 5.

That they who pursue young women, whether married or unmarried, or widows who lead virtuous lives, or send pimps or jewels to them, dishonour them thereby.

Men sometimes offend, dishonour and harass, by various means, married or unmarried women, or widows who lead virtuous lives at home and enjoy good characters, by endeavouring frequently to speak with them, either in the houses where they dwell, or by following them in the streets, churches or other places where they are to be found; or by secretly sending jewels to them and those with whom they live, in order to corrupt them both; at other times by endeavouring to corrupt them, by means of pimps, and in various other ways, so that by great importunity and artifice, there are some women who are finally seduced. And even good women who resist their attempts, are, in a manner, injured in their character, in as much as they will be suspected of committing some evil with those who pursue them so assiduously, in either of the ways above mentioned. Wherefore we consider that they who conduct themselves in this manner, do great wrong and injury to such women, as well as their fathers, husbands, fathers in law, and other relations. We therefore ordain that every man who shall offend in either of the ways herein mentioned, shall make amends to the woman who sustains injury thereby.

[No other part of this law in force.]

LAW 6.

In how many ways one man may injure another by deed (defecho)

If one man strike another with his hand, foot, a stick, stone, or with arms, he does him a wrong and injury, (*deshonra*.) Wherefore we say, that the person injured or dishonoured, may demand reparation therefor, and the judge shall cause the wrongdoer to make amends accordingly. We likewise say that there are other ways by which one man may injure another: as where he runs after or follows him, with the intention to strike or seize him; or if he confine him in any place; or enter forcibly into his house, or carry off any of his property by violence. Wherefore we say that any person who wrongs or injures another, in any of these, or other similar ways, shall make reparation, according to the nature of the wrong or injury done. Moreover we say, that if one man designedly tear the clothes of another; or forcibly strip them off; or spit on his face; or raise a club, or other thing with his hand, in order to strike him, though he should not do it, yet he will do him a great injury, for which the person injured may sue for reparation, and obtain amends, at the discretion of the judge. There are various other ways by which one man may wrong or injure another; as if he arrest his debtor for what he owes, without the order of the judge, or without having any right to do it; or shut him up in his house, in such manner that no one can enter in, or go out of it; or where two men inhabit different houses, the

one above the other, and he who lives above, knowingly pour out water, or any filthy substance, to injure or vex the other; or where he who lives below, intentionally makes a fire of wheat straw or green wood, in order to smoke or injure him who lives above; or where any one puts, or causes to be put, any thing at the door of another person, as horns or other similar things, in order to scandalize him; or where a man gives another a book to colour or bind, and he who receives it, throws it in the streets, whether they be muddy or not, in order to insult (*dishonour*) him; or where a taylor or other workman throws in the same manner, the clothes or other things which another had given to him to make anew or mend; for in whichsoever of these or other similar ways, one man scandalizes another, he will be bound to make amends therefor, at the discretion of the judge. (1)

LAW 7.

That one man may injure another by wrongfully suing him, or claiming him as a slave, when he is free.

Men sometimes endeavour to wrong or injure others, in many ways different from those above mentioned; as where they wrongfully and maliciously institute suits against any one, with the intention of involving him in costs and expenses, and to cause him to lose his labour, or any thing else in which he was profitably engaged, in order thereby to bring him to terms and to extort something from him; or to pre-

(1) *R. see the laws of the title 10, b. 8.*

vent him from going on a journey, which they knew he was about to undertake ; or where they injure him still more grievously, by suing him in law and claiming him as their slave, well knowing that they had no right to do so, and thereby defaming both him and his children. There are some again, who presume to do still greater injury to others, by arresting them, after they are enfranchised, knowing that they have no claim whatever to them. We therefore ordain, that whoever shall wrong or injure another, in any of these or other similar ways, shall make amends, at the discretion of the judge.

LAW 8.

Who can do an injury to another.

Every man or woman above the age of ten years and six months, is capable of doing wrong or injury to another ; for the ancient sages have conceived that after that age, every person ought to have the understanding to know when he injures another, unless he were a madman or lunatic, in which case, he will not be bound to make amends for any thing he may say or do, as he is ignorant of what he is doing, while deprived of his reason. But the nearest relations of such persons, or those who have the guardianship of them, must cause them to be taken care of, and guarded in such manner that they cannot wrong or injure any one, as we have prescribed in several laws of this book ; and if they neglect to do so, they may be sued for the injury which such persons commit.

LAW 9.

Who can be injured; who may demand amends therefor, and before whom.

A wrong or injury may be done to every man or woman, of whatever age they are, and whether they be of sound mind or not; for in this last case, the guardians of such persons, may sue for amends for the injury they have suffered; and so with respect to guardians who have minors under their care. We also say that the father may demand reparation for the injury done to his son; the grandfather and great grandfather for his grandson or great grandson, as well as for those whom they have under their power; or the husband for the wife; the father in law for his daughter in law, and the master for his slave. But with respect to the injury done to a slave, a distinction must be made; for if he be hurt by grievous blows, or if any thing be said to him which slanders his master, reparation may be demanded therefor. But if he receive slight blows only, as a stroke of the fist on the back, or a push, or if the words affect him only, and not his master; in that case, the latter cannot demand amends for the same.

[No other part of this law in force.]

LAW 11. (a)

That the heirs may demand reparation for an injury received by the person from whom they inherit, while he was sick.

It sometimes happens that where a man is sick with a disease of which he dies, other persons presume to enter his house and carry off the whole, or some portion of his property, without the order of the judge of the place, saying that they are his creditors, thereby wronging and doing him damage, while their conduct is highly illegal and unjust. For although he should be really indebted to them, nevertheless they ought not to seize upon his property in this manner, nor harass him for what he owes, while he is in such danger of dying; for it is enough that he should suffer under his infirmity, without having it increased and aggravated by being thus vexed and stripped of his property, at such a period. We therefore say that if any one, without the order of the judge, seize and carry off the property of another person, in the manner above mentioned, he will thereby lose the debt really due him, and shall moreover pay the heirs of such person, as much more as was due, and will ever after remain infamous. And if nothing happen to be due him, he will be bound to make amends to the relations of the deceased, for the injury done both to him and them, at the discretion of the judge of the place.

[No other part of this law in force.]

(a) The preceding law is not in force. For its head, see the index to this title.

LAW 12.

Of the penalty incurred by those who break the tombs of the dead, and disinter their bodies.

[Not in force] (a)

LAW 13.

That the heirs may demand reparation for an injury done to the person from whom they inherit, after his death.

When a man is dead, his creditors ought not to detain his dead body, nor prevent its burial, nor dishonour it, in any other manner whatever. And if any one violate this law, on account of a debt due him from the deceased, or with an intention of dishonouring him, he will err in the eyes of God and of men, and do an injury to his heirs, for which he will be bound to make amends, at the discretion of the judge of the place, according to the nature of the wrong or injury done. We likewise say that if any one maliciously defame the memory of a person deceased, his heirs may demand reparation therefor, in the same manner as if the words had been uttered against themselves, because in law, the deceased and his heirs are considered as but one person.

[No other part of this law in force.]

(a) As this law speaks only of criminal punishments and penalties, its translation is omitted.

LAW 14.

That reparation may be claimed of the master, for the injury done by his slave to another person.

If a slave wrong or injure any one, his master is bound to deliver him to the person injured, that he may chastise him with blows (*con feridas*), so as not to kill or maim him. And if he should not be willing to deliver him up, he will be bound to make reparation therefor, at the discretion of the judge, or to abandon the slave to the injured party, in lieu of damages. (1)

LAW 15.

In what cases a man cannot demand reparation for an injury received. (a)

[Not in force.]

LAW 16.

That when the judge causes a man to be arrested by virtue of his office, the latter cannot complain as for an injury done him.

Judges ought to be careful not to speak rudely to, or injure those who come before them in pursuit of their rights ; and if they act otherwise and injure the parties, either by word or deed, without cause, they

(1) *C art 22, p. 40.*

(a) This law relates to military punishments only.

will, at all events, be bound to make greater amends therefor, than if any other person had done it. (a)

[No other part of this law in force.]

LAW 18. (b)

In what case reparation cannot be demanded for an injury done to an unmarried woman or clergyman.

If women of good character, whether married or unmarried, go to houses and places where bad women live or assemble, and any one injure them by word or deed, or take liberties with them, they cannot demand reparation therefor, as virtuous women could do.

[No other part of this law in force.]

LAW 19.

That if any one, in attempting to serve a friend, should throw an impediment in the way of another person, the latter cannot claim amends for the same, as for an injury done him.

If the king or corporation of any town or city, should intend to place any one in an honourable office, or contract with him, touching their revenues; if, then, some one else should request the king or corporation to give the office or contract to some one else, saying, that he was more intelligent, or better calculated for it, than the other, who is, by that means, prevented from obtaining the office or contract; nevertheless he can-

(a) That part of this law not translated, speaks of the power of arrest given to judges in criminal matters.

(b) The preceding law is not in force. For its head, see the index to this title.

not claim amends as for an injury, of the person by whom he was presented, in as much as it ought to be presumed that he who made the request had not done it, with an intention of doing him any injury, but with the view to serve the king, corporation, or his friend.

LAW 20.

What are grievous injuries, called in Latin atroces, and what are not.

There is a great difference between the injuries which men receive from one another. For there are some that are called in Latin *atroces*, which means in common speech, cruel and grievous. These are distinguished into four kinds. The first is, where the injury is heavy and grievous in itself, by the nature of the act alone; as when the person receiving it, is struck with a knife or other arms, so that blood flow, or he be maimed in his limbs; or when he is struck on his body with a club, hand or foot, with the intention of insulting him. The second arises from the part of the body struck, as if the blow be given upon the eye or face; or from the place where the blow is given, as when a man is injured by word or deed, in the presence of the king; or before any one appointed to administer justice for him; or before a city council; or in a church, or any where else, publicly and before many persons. The third arises from the condition of the person injured, as when the injury is received by the grandfather from his grandson, or the patron from his freedman; or the person who reared up any one, from him whom he reared up; or the

judge from any one over whom he has jurisdiction. The fourth arises from the songs, or rhymes, or libels by which one man injures another. And all the injuries which men receive, either by word or deed, not aggravated by the act itself, or on account of the places where they are committed, or the condition of the persons who received them, as above said, are considered as slight injuries (*livianas.*) Wherefore we ordain that the judges who have to decree amends therefor, ought to make a distinction between them, so that they adjudge heavier reparation for grievous injuries, than for those that are slight, so that the person doing the injury by word or deed, be punished as he deserves accordingly, as the injury shall be grievous or slight.

[No other part of this law in force.]

LAW 21.

What reparation ought to be made to the person injured.

We cannot establish any certain punishment or reparation for the wrongs or injuries which men do to one another, in as much as they are of different or unequal degrees, according to the nature of the act and condition of the persons, as explained in the preceding law. Wherefore we ordain that whoever receives a wrong or injury, may demand reparation, in either of the two following ways, at his option. The first is by causing the party who does the injury, to make amends in money (*pecho de dineros.*) The second is by criminal prosecution, praying that the judge inflict upon the wrongdoer such punishment, as in his discretion, he shall think he deserves. And one of

these actions destroys the other, in as much as when once the party injured has selected one of them, he cannot abandon it and have recourse to the other. (1)

[No other part of this law in force.]

LAW 22.

Within what time a man may demand reparation for an injury done him.

A man may demand reparation for any wrong or injury done him, at any time within one year thereafter. And if he omit to bring suit therefor within that time complete from the day he received the injury, he cannot do it afterwards, as it would be presumed that he did not conceive himself injured, or that he had pardoned the wrongdoer, as he had remained silent so long, without complaining. We likewise say that if a man receive an injury from another, and afterwards voluntarily associate and eat with him, or live with him in either of their houses, or in any other place, he cannot afterwards demand reparation for such injury or wrong. We moreover say, that if after one man had received an injury from another, the wrongdoer should say to the party injured: "I beg you not to consider yourself injured by what I have done to you, and that you will not complain of me;" and the other answer: "that he should not consider himself injured, or that he wish no harm to him on that account, or that he will not complain of him," then the wrongdoer will not be bound to make amends for the same.

(1) *R. l. 2, tit. 10, b. 8.*

LAW 23.

That the heir cannot demand reparation for an injury done to the person from whom he inherits, unless the suit had been already commenced by the deceased.

The heir cannot demand reparation for the wrong or injury done to the person from whom he inherits, during his life, unless the deceased had instituted a suit therefor before he died, and issue had been joined upon the same. For then the heir may enter upon the suit, in the condition it was left by the deceased, and prosecute it to judgment; and the wrongdoer will be responsible to the heir, in the same manner as to his ancestor, if he were living. But if the deceased had not, in his life time, commenced the action, as above said, his heirs cannot do it after his death, because such suits, which are followed by vindictive punishment, do not pass to the heir, if they had not already been begun by those from whom they inherit, unless the injury had been done to the deceased, while he was afflicted with the infirmity of which he died, or after his death, in the manner above mentioned. We moreover say that if the wrongdoer die before he had made amends for the injury he had done, no action can be brought therefor against his heirs, unless one had been already commenced against him during his life, and issue joined thereon; for then his heirs will be bound to defend it in the condition it was left by their ancestor, and if they be cast, they will be obliged to make reparation in his stead.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
force, or violence.

Digest, lib. 48, tit. 6. - - - *Ad legem juliam de vi publica.*

Digest, lib. 48, tit. 7. - - - *Ad legem juliam de vi privata.*

Code, lib. 9, tit. 12. - - - *Ad legem juliam de vi publica et de privata.*

Fuero Juzgo, b. 8, tit. 1.

Fuero Viejo, b. 1, tit. 6.

Fuero Real, b. 4, tit. 4.

Ordenamiento de Alcala, tit. 72.

Ordenamiento Real, b. 8, tit. 18.

Recopilacion de Castilla, b. 4, tit. 13, l. 1....ibid, b. 6, tit. 5,
l. 10....ibid, b. 8, tit. 18.

Civil Code, b. 3, tit. 3, ch. 2, sect. 1, ll. 9, 11, 12, 13, 14,
15 & 17.

OF FORCE OR VIOLENCE.

What is meant by force or violence, and how
many kinds there are, (a) - - - - - LAW 1

What punishment they deserve, who, with arms
and with armed men, put fire to the houses or
crops of another person, as well as their aiders
abettors ; and of others who set things on fire
by accident or otherwise, - - - - - 9

(a) As laws 2, 3, 4, 5, 6, 7 and 8, of this title, relate to criminal justice only, it was thought unnecessary to give their heads

- What punishment a man deserves, who, of his own authority and without the order of the judge, seizes upon or takes possession by force, of the estate or thing of another, - - - - - LAW 10
- In what cases he who dispossesses another of a thing he has in his power, will not incur the above mentioned penalty, (a) - - - - - 11
- That the suit brought for the restitution of a thing taken by force, ought to be determined before any other suit concerning such thing, - - - 18

TITLE X.

Of force or violence (fuerça.)

LAW 1.

What is meant by force, or violence, and how many kinds there are.

Force, or violence, is that which is wrongfully done to a man who is not able to defend himself against it. There are two kinds of it, the one committed with arms, and the other without. With arms, when one man attacks or strikes another with weapons of wood or iron, or with stones, or takes persons with him armed in that manner, in order to harm or injure any one in his person or property, by striking, killing or robbing him, though they should do neither. So a man would commit the same offence, if he go armed in the man-

(a) No mention is made of the heads of laws 12, 13, 14, 15, 16 and 17, of this title, for the reason mentioned in the preceding note.

ner above mentioned, and surround or attack any one in his castle, house or other place, or confine, or compel him to enter into any agreement to his prejudice or against his will. (a)

[No other part of this law in force.]

LAW 9. (b)

What punishment they deserve, who with arms and with armed men, put fire to the houses or crops of another person, as well as their aiders and abettors; and of others who set things on fire by accident or otherwise.

Though fire be not put to any thing maliciously, yet if it do damage through the fault of another; as if the weather be windy and he kindle it in such a place as that by the force of the wind it be communicated to any house, harvest or other thing, and injure it, then he who has so kindled or caused the fire to be kindled, will be bound to pay all the damage which it does, as it happened through his fault, by not being as careful as he ought to have been, or by kindling the fire when the weather was windy.

[No other part of this law in force.]

(a) By the laws of this title, every sort of violence was punished criminally, and the author of it lost his right, if any he had, to the thing taken by force, and was moreover subject to a pecuniary fine in favour of the party injured. No other part of the title is translated, except that which is applicable to ordinary trespass.

(b) The preceding laws, from 2 to 8 inclusively, are not in force.

LAW 10.

What punishment a man deserves, who, of his own authority and without the order of the judge, seizes upon or takes possession by force, of the estate or thing of another.

If any one, of his own authority, and without the order of the judge, seize upon, or forcibly take possession of, the property of another, whether moveable or immoveable, he will be bound to return it, with all the fruits or revenues he had gathered from it. And if the guardian of a minor, or madman, seize upon the thing of another, in the name of his pupil, in the manner above mentioned, he will be bound to pay therefor, in the same manner as if he had acted for himself, out of his own effects, and not those of the minor. (1)

[No other part of this law in force.]

LAW 11.

In what cases he who dispossesses another of a thing he has in his power, will not incur the above mentioned penalty.

If a man hire, lend or commit any specific thing to the care of another, although this other may make use of it, for the time agreed on, nevertheless the property and possession of the thing always remain in the owner; for he who possesses a thing in this way, does not hold it for himself, but in the name of the person who gives it to him to keep, or hired it to him. We therefore say that if the owner, of his own authority and without the order of the judge, should take the thing away

(1) R. l. 10, tit. 5, b. 5—l. 1, tit. 13, b. 4—l. 3, tit. 13, d. 8.

from the person so in possession of it, he will be bound to restore it, in order that such person may make use of it, during the time agreed upon, when it was given to him. We likewise say, that if a woman who is pregnant by her deceased husband, be put in possession of his estate as guardian of her unborn child or in any other similar manner, and any one afterwards deprive her of the possession of the same, he will be bound to restore it, with all the loss and damages arising on that account. (1)

[No other part of this law in force.]

LAW 18. (a)

That a suit brought for the restitution of a thing taken by force, ought to be determined before any other suit concerning the thing.

Suits sometimes arise concerning things taken by force, and the persons from whom they are taken, pray that they may be restored to their possession, while they who took them, refuse to do it, alleging that they are the owners and are entitled to them, and are willing to prove it; or some third person intervenes, claiming the thing as his own, and offering to prove the same. We therefore say, that whenever such claims are made to the same thing, that the

(1) R. l 4. tit 15, b. 4.

(a) The preceding laws, from 12 to 17 inclusively, are not in force.

claim of him who alleges that it was taken from him by force, while he was in possession of it, shall be first heard and determined according to law, and afterwards the claims of the others. (1)

(1) *R. ll. 2 & 3, tit. 13, b. 4—C. art. 24, p. 478.*

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of **LAS SIETE PARTIDAS** on
damages.

Digest, lib. 9, tit. 1. - - -	<i>Si quadrupes pauperiem fecisse dicatur.</i>
Digest, lib. 9, tit. 2. - - -	<i>Ad legem aquiliam.</i>
Digest, lib. 9, tit. 3. - - -	<i>De his qui effuderint vel dejecerint.</i>
Digest, lib. 9, tit. 4. - - -	<i>De noxalibus actionibus.</i>
Institutes, lib. 4, tit. 8. - -	<i>De noxalibus actionibus.</i>
Institutes, lib. 4, tit. 9. - -	<i>Si quadrupes pauperiem fecisse dicatur.</i>
Code, lib. 3, tit. 35. - - -	<i>De lege aquiliâ.</i>
Code, lib. 3, tit. 41. - - -	<i>De noxalibus actionibus.</i>
Code, lib. 9, tit. 3. - - -	<i>De his qui effuderint vel dejecerint.</i>
Domat's Civil Law, part 1, b. 2, tit. 8.	
Fuero Juzgo, b. 8, tit. 5.	
Leyes del Estilo, l. 227.	
Civil Code, b. 3, tit. 4, sect. 2, art. 16.	

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TITLE XV.

Of all kinds of damages, which men or beasts do to the property of other persons.

LAW 1.

What is meant by damage, and how many kinds there are.

By damage is meant the deterioration, detriment or loss, which a man sustains in his person or property, through the fault of another. There are three kinds of damages. The first is, where a thing is deteriorated either by being mixed with some other thing, or by an injury done to it. The second is, where the value of the thing is diminished by some damage which it sustains. The third is where, by the effect of such injury, it be entirely lost or destroyed.

LAW 2.

Who may demand reparation for damages done.

The owner, as well as his heir, may demand reparation for the damage done to his property. But if he had granted the usufruct of any thing to another, during his life ; or if any one else be in possession of it, in good faith, believing that it was his own ; or if it be under the care of any person in a place where the owner is not, then each of them, or their attornies in fact, may demand reparation for any damages done to it. We likewise say, that where any one does damage to a thing given in pledge, if the pledgor be unable to redeem it, and the pledgee to recover what he had

given upon the pledge, then the latter may demand reparation for the damage done to the thing. And whatever he may receive in that respect, he will be bound to deduct from the debt due upon the pledge, and if the reparation should exceed the debt, he ought to return the surplus to the owner. But if the latter be able to redeem the thing, and be in the place where the damage is done to it, then he, and not the pledgee, may demand reparation. We further say that if any one be entitled to receive from another a slave, beast or any thing else, which had been bequeathed to him by will, and any damage be done to it, so as it be lost or deteriorated, he who has possession of it, at that time, may demand reparation, if he who is entitled to it, be absent. But if he should be present, then the former shall grant him the power to demand reparation for such damage.

LAW 3.

From whom, and before whom, reparation for damages may be demanded.

He who causes damage, shall make reparation therefor to the person who received it, whether it had been done by himself or by his command or advice, or had happened through his fault, unless he were a lunatic, madman, or a minor under the age of ten years and six months, or had done it in defence of his person or property. For in these last cases no reparation can be demanded. We likewise say that the heirs of any person who has done damage to the property of others, will not be bound to make amends for the same, after

the death of him from whom they inherit, unless a suit had been commenced during his life and issue joined thereon. For then they will be bound to make amends, if they should be cast in the suit. We further say that although issue were not joined, nevertheless, if the heirs had derived any profit from the damage done by the person from whom they inherit, they will be bound to make amends for the same to him who had received the damage, or his heirs, in proportion to the profit so derived.

[No other part of this law in force.]

LAW 4.

That the judge will not be bound to pay for the damage he does to any person, in the legal discharge of the duties of his office (derechamente.)

When a judge renders judgment against any one legally, and orders it to be carried into execution, if, in so doing, he seize any property for that, or other similar reason, and he, or some one else, by his order, do damage to the defendant, or restrain him in any other respect, he will not be bound to make amends therefor. But if the judge, or any one, by his order, injure another wrongfully, then he will be bound to make reparation for the same. We likewise say that if any judge, or those empowered to execute his judgments, or the collectors of the king's revenues, seize beasts or cattle, on account of taxes that are due, or for any other cause whatever, they ought not to confine them so as to prevent them from taking food

or water, otherwise they shall pay to the owners, all the loss and damage sustained thereby. (1)

LAW 5.

That they who are under the power of others, are not responsible for the damage they do by the orders of their superiors.

The son who is under the power of his father, or the slave that of his master, or the minor under twenty-five years of age who has a guardian, are not responsible for the damage they do to the property of others, by the orders of those under whose power they are, but the latter will themselves be bound to make amends for the same. We likewise say that if any man wrong or injure another, by the order of the judge of the place, the judge will be responsible, and not the person who committed the injury. But if any other person whatever wrong or injure another by the order of one, who has neither power nor jurisdiction over him; then both him who gave, and he who received the order, will be bound to make amends for the damage done. Yet if any person, who is in the power of another, as is above said, wrong or injure any one else, without the command of him under whose power he is, then the former, and not the latter, will be bound to make amends for the same; except, however, the master, who is always obliged to make reparation for the injury done by his slave, or in lieu thereof to abandon him to the person injured. (2)

[No other part of this law in force.]

(1) *R. l.* 1, *tit.* 17, *b.* 5—*ll.* 5, 6 & 7, *tit.* 17, *b.* 5

(2) *C.* *art.* 21 & 22, *p.* 40—*ibid.*, *art.* 20 & 21, *p.* 320 & 322,

LAW 6.

That he who causes damage to another, by his fault, is bound to make reparation therefor.

If two men be fighting together, and one of them, wishing to strike his antagonist, hit another person, he would be bound to make amends for the same, though he did it against his will, for notwithstanding he did not knowingly injure such third person, nevertheless it happened through his fault. But if a man run his saddle or other horse, or play at tilt or tournament, in any particular place, where such things are customarily done, and in going across the road, strike against any one, he will not be bound to make reparation for the damage he may commit in this way, as it would be the fault of the person injured, and not of him who rode the horse. If, however, the person running his beast, see the other crossing the road, and can stop or turn it aside, so as not to strike him, but is unwilling to do it; or if he do any of these things in a place where a great many people are passing, or where they are not usually done, the fault will then be his, and he will be bound to make reparation therefor, as it is to be presumed that he did the injury intentionally. So we say it would be with respect to those who injure any one, by shooting cross-bows, in places where people frequent. We also say, that if a man be working on a house or other building, or cutting a tree situated upon the street or road where men are in the habit of passing, he ought to cry out aloud to those who are going by, to take care; and if he do not do it accordingly, or do it in such a manner and at such a time, that they

who are passing by, cannot get out of the way, and any thing fall from the house or tree and do damage to any one, then the undertaker, or the workman doing the work, will be bound to pay for the injury thus happening through his fault. And if the thing that fell, happen to strike a free man, he will be bound to pay all the expenses incurred in curing the wound, and all the damages the person wounded may sustain in his business, if he be an artificer.

[No other part of this law in force.]

LAW 7.

That they who make pits and holes, or fix traps in roads, to catch game, will be bound to make reparation therefor.

We also say that if any man convey wild bulls, cows or other beasts from one place to another, he ought to do it and take care of them in such a way, that they commit no damage; and if they act otherwise and such animals do any damage, the person who conveys them, will be in fault, and responsible for the injury done. (1) (a)

LAW 8.

That he who takes the slave of another out of prison, ought to pay for him, if he run away.

When a man has his slave in prison, confined in irons or chains, or bound with cords, or in any other

(1) *R. l. 6, tit 8, b. 7.*

(a) No other part of this law has been translated, being considered as inapplicable to this country.

similar manner ; if then any one, through compassion to the slave, or ill will to the master, unbind the slave or take him out of prison, he will be bound to pay the master all the damages he sustains, in case the slave run away or his master lose him.

LAW 9.

That a physician, surgeon or farrier, is bound to pay for the damages which other persons sustain by their fault.

If a physician, surgeon or farrier, take the slave or animal of any one under his care, and cut or burn or physic it in such manner as that it die, or be maimed, he will be bound to make amends to the owner for the damage he sustains in such slave or beast. So it would be, where the physician, surgeon or farrier had commenced the cure of any slave or beast, and should afterwards abandon it, he will be bound to pay for all the damages happening on that account.

[No other part of this law in force.]

LAW 10.

That he who kindles fire, in windy weather, in the neighbourhood of straw, timber, or stacks of corn, or in any other like place, will be bound to pay for the damage happening on that account.

If a man set fire to stubbles of corn, to burn them, in order to ameliorate his lands ; or to wood, in order to clear his ground and render it fit for cultivation, or to any field, to make the grass grow better, or to any thing else, which he wished to consume, he ought to take care not to kindle the fire when the wind blows strong,

nor near straw, timber or an olive orchard, lest he do damage to other persons; for if he act otherwise, and the fire do any injury, he will be bound to make amends therefor to the persons to whom it is done; and he cannot excuse himself by saying that he did not do it with evil intentions, and did not believe that he should do harm to any one.

LAW 11.

That he who keeps an oven for baking bread, or a plaster or lime kiln, is bound to pay all the damages which another person sustains thereby, through his fault.

If, while a man is burning lime, plaster, tiles, or bricks, in a kiln, or baking bread in an oven, or melting any metal, he fall asleep and the fire increase so as to destroy or damage what is in the kiln, oven or furnace, he will be bound to make amends for the loss or damage, since he was in fault for not having arranged the fire before he went to sleep, in such way as to prevent the injury done to the thing in the furnace. So it would be if the injury had happened through his fault, in any other manner, by his not taking proper care of such furnace or oven.

LAW 12.

That he who pulls down his neighbour's house, to prevent his own from being consumed by fire, will not be bound to pay for the damage he causes thereby.

[Not in force.] (a)

(a) Abrogated by the civil code, art. 20, p. 130.

LAW 13.

That he who bores a hole in any vessel, will be bound to pay any damages happening to it, as well as to the goods on board.

If a man knowingly pierce any ship so that the water enter through the opening and injure the merchandize or other things on board, he will be bound to pay for all the damages he causes thereby, either to the vessel or goods. We also say that if any man intentionally throw any substance into the wine or oil of another person, or in any similar thing of a liquid nature, so that it be thereby lost, damaged or deteriorated; or if he break or pierce the vessels in which any of these fluids are contained, so that they leak out or be destroyed, he will be bound to pay for all the loss he causes by these means. And so where he throws any substance into a hopper of wheat or any other grain, and cause any damage or deterioration by such malicious act, he will be bound to make reparation for the same.

LAW 14.

That if one vessel strike against another, from the violence of the wind, the owner will not be bound to pay for the damage happening thereby.

If a vessel be anchored in any port or near the sea-shore, or be in motion either by oars or sails; if then other vessels that are coming towards it, be driven against it by a violent wind or tempest, and they happen to strike against each other and damage be done, nevertheless the owner of the former will not be bound

to pay for the same, in as much as it does not happen through his fault. So it would be with respect to similar accidents happening in rivers or other places.

LAW 15.

That where several persons assemble together to do damage to any one, by killing his slave or beast, reparation may be demanded of either of them.

If a number of persons assemble together to kill a slave or a beast, and they all strike it, so that it cannot be known of which blow it died, then the owner may demand reparation from all or either of them, at his option, by compelling them to pay the estimated value of the thing killed. And when he has once received reparation of one of them, he cannot afterwards claim it from the others. But if it can be ascertained with certainty who gave the mortal blow, then the owner may claim reparation of him alone, for the loss of the animal, while the others will be bound to make amends for the blows they had given.

LAW 17. (a)

That if a man confess in court he had done an injury to any one while, in truth, it was another person, and not himself, he shall nevertheless make reparation therefor.

Where a man confesses in court, that he had done an injury to any thing belonging to another person, he will be bound to make reparation for the same, though

(a) The preceding law is not in force. For its head, see the index to this title.

in truth, it had been committed by some one else. But if the injury which he confesses he had done, had never in fact been committed by himself, nor any one else, on proof thereof, such confession shall not prejudice him. (1)

LAW 18.

What distinction ought to be made between the things to which damage is done, as well as in estimating their value.

If a man complain before a judge of any damage which another has done him, by killing his slave, horse, mule, ass, mare, elephant, cow, ox, hog, ewe, ram, wether, goat, or the young of any of these animals, then the judge ought to order reparation to be made for each of them, so that the wrongdoer shall pay as much as the animal was worth at any time within one year preceding its death. But if the damage did not consist in killing, but in having struck either of these animals, by which it was deteriorated ; or if any other beast than those above mentioned had been killed or struck ; or if any one burn, pull down or destroy, or do damage to any other thing whatever ; then the judge ought to estimate the loss sustained by the death, or the damage done to such thing, and order the wrongdoer to pay the highest value the thing was worth at any time within thirty days previous to the injury done.

[No other part of this law in force.]

(1) R. l. 14, tit. 8, b. 2.

LAW 19.

What reparation ought to be made to the master, where any one kills his slave, who was a painter.

If the slave who is killed were a painter, notwithstanding he had lost the thumb of his right hand by disease or accident, within the year previous to his death, nevertheless the wrongdoer will be bound to pay his value, in the same manner as if his thumb were entire at the period of his death. We likewise say that if a man have two slaves who sing in concert, and any person kill one of them, he will not only be bound to pay his value, but likewise so much more, as the value of the survivor shall be estimated to have been diminished thereby. And what we here say, applies to all like cases, so that he who does damage to any other similar thing, will be bound to make amends not only for the thing injured or killed, but also for the loss which the owner sustains on that account.

[No other part of this law in force.]

LAW 20.

That he who advises a slave to do any thing which causes his death, shall pay for the same.

If any person instigate or induce another's slave to climb up a rock, tree or other dangerous place, or to descend into a well, or in any other low or deep place, and he fall either in ascending or descending, so as to kill or wound himself; then such person will be bound to make amends for the damage which the owner of

the slave sustains on that account. We also say, that if a slave be on a ship, bridge, or bank of a river, and any person push him so that he fall into the water and be drowned ; or if he be on a tower, house, or any other high place, and any one push him so that he fall and get killed or wounded, the wrongdoer will be bound to make reparation to his master, for the damage sustained, whether he gave the push through play, or otherwise.

LAW 21.

That he who designedly unties a dog so that he bite any person, or frighten any animal, shall pay the damage arising therefrom.

If a man designedly untie and set at liberty a dog that he keeps confined, in order to do damage to another person, in any way ; or if the dog, being unconfined, and any one excite him so that he throw down, bite, or do any other injury to any person or thing, the wrongdoer will be bound to make amends for any damage caused by the dog. We also say that if any man intentionally frighten an animal, so that it get lost or be deteriorated, or if it run, by reason of the fright, so as to cause damage to any thing, he who frightens it, will be bound to pay for all the damages happening thereby. So we say it would be, if a mule, cow or other beast, be passing on a bridge, and any one frighten it, so that it fall into the water and be killed or hurt ; in this, and all other similar cases, in which damage happens to any one, reparation may be claimed of the person who gave the fright, and he will be bound to pay the same.

LAW 22.

In what cases the owner is bound to pay for the damage done by his horse, or other domestic animal.

There are certain animals which are naturally peaceable, as horses, mules, asses, oxen, camels, elephants, and other similar beasts, wherefore if any of them do damage from their own disposition and habits; as if a horse, or other beast which men usually ride, should strike or injure any thing, without the fault of any person; or if a bull, ox, cow or other like animal, of a peaceable nature, should damage any thing from its own viciousness, and without the fault of any one; in that case the owner will be bound to do one of two things, either to make reparation for the damage, or to abandon the beast to the person who received it. But if the damage should not arise from the viciousness of the beast, but from the fault of some person who struck, frightened or goaded it, or hurt it in some other way, then he by whose fault it happened, will be bound to make amends therefor, and not the owner of the beast.

LAW 23.

That he who keeps a lion, bear, or any other wild beast in his house, will be bound to pay for all the damage caused thereby.

If a man keep in his house a lion, ounce, leopard, bear, wolf, lynx, weasel, serpent or other animal naturally wild, he ought to confine it in such way as that it shall do no damage; for if it do any, the owner

will be bound to pay double the amount thereof, if the damage be done to the property of any one else : and if it be done to his person, so as to wound him, then the owner will be bound to cause his wound to be cured, furnishing the medicine, and paying the physician, until the cure be effected. He shall moreover pay the value of the labour lost by the person injured, from the time he was wounded until the day he recovers, as well as all the loss and damages he may have sustained in any other way, on account of the injury he suffered from the beast. And if the person wounded remained maimed in any of his limbs, the owner of the beast shall make amends therefor, according to the discretion of the judge, who shall take into consideration the person who is injured, and the limb that is maimed.

[No other part of this law in force.]

LAW 24.

That the owner of flocks and herds, is bound to pay for the damages they do to the estates of other persons.

If cows, sheep, hogs, or any cattle or beasts which are reared up by men, do damage to the vineyards, gardens, harvest, meadows, or any thing else belonging to other persons ; and the damage be manifest, or can be proved by the persons who received it, the owner of the animals will be bound to make amends therefor, the amount of which shall be estimated by good and skilful men. And if it be discovered that the owner or keeper of the flocks, had intentionally caused the damage, he will be bound to pay double

the amount of the same to the person who received it. (a) But if it had happened unintentionally, having been caused by the flocks that had escaped and done it, without the knowledge of their keeper, he will then be bound to pay the damage once only, or to abandon the flocks or animals which caused the injury in lieu of damages. We moreover say, that although the person receiving damage, in any of the ways above mentioned, should find the flocks or beasts in the act of committing it, we forbid him from either killing, wounding, maiming or confining them, or from doing them any injury whatever, but that he let them go unmolested, and apply to the judge for reparation, as is above said.

LAW 25.

That they who throw bones, or filth into the streets, shall pay for the damage which they cause to persons passing there.

Men sometimes throw water, bones, or other like things, out of the houses in which they live, into the streets, and although they should not do it with the intention of injuring any one, yet if they do damage to the clothes or garments of others, they who dwell in the house, will be bound to pay double the amount of such damage. And if many persons should live in the house from which the substance was thrown, whether it belonged to them, or had been hired or borrowed by them, they will be jointly bound to pay for

(a) This part of the law being of a penal nature, is translated only that the other parts might be the better understood.

the damage, if it should not be known with certainty who had caused it. But if it should be known who he was, then he alone will be responsible for the damage, and not the others. But if among those who dwell habitually (*cotidianamente*) in the house, there should be some persons received as guests, these will not be bound to contribute in any manner to the damage caused in this way, unless they were the authors of it.

[No other part of this law in force.]

LAW 26.

That innkeepers who fix signs over their doors, ought to fasten them in such a manner as that they shall not do damage to others.

Innkeepers and other persons sometimes affix signs at their doors, in order that their dwellings may be the better known; as the figure of a horse, lion, dog or other like thing. And as these signs are suspended over the streets where people pass, we ordain that they who put them there, shall attach them with chains of iron or some other substance, so that they shall not fall and do damage. And if any one happen to place his sign so that there be reason to suspect that it may fall, and complaint be made thereof, or if it be discovered that there is danger of its falling and causing damage, although it should not fall, or do any, the owner ought to remove it, or fasten it in such a manner that it cannot fall and do damage. Otherwise, if it fall and do injury to any one, the owner of the house where it was suspended, shall pay double the amount of the damage sustained.

[No other part of this law in force.]

LAW 27.

That barbers ought to exercise their trade in particular places, so that they whom they shave, may sustain no damage.

But we say that if a barber be shaving a man, and any one push him in any manner, so that he kill, wound, or hurt the person whom he is shaving, he by whose fault it was done, will be bound to make reparation therefor.

[No other part of this law in force.]

LAW 28.

That they who maliciously cut trees, vines or their props, shall pay for the damage they do.

And we ordain that if any one do damage to the vines of another person, or his fruit trees, by cutting, tearing, or destroying them in any manner, the owner may claim amends from the person doing it, to double the amount of what the damages shall be estimated at, by good and skilful men. But if a man have a tree whose roots are in his own ground, but whose branches extend over his neighbour's house, then the latter may petition the judge of the place, to order the owner of the tree to cut it off at its roots, on account of the damage it does to his house. And the judge ought to go and see it, and if he find that it causes any damage, he ought to order the owner to cut it accordingly; and if he should not be willing to comply with the order of the judge, the petitioner may cut it down himself, without incurring any penalty therefor. (a) And

(a) All judgments are now carried into execution by the sheriff.

we moreover say that if a tree be rooted in one man's garden, or land, and extend its branches over the ground of another, the latter may petition the judge, to order that the branches which extend over, and do damage to his land, be cut away ; and if the owner of the tree be unwilling to do it, upon the order of the judge, the petitioner may do it himself, without incurring any penalty for the same. And so we say it would be, where a fig or other tree extend its branches over the public way, in such manner as to prevent people from passing freely, any person whatever may cut away such branches, without incurring any penalty on that account.

TITLES

Of the Roman and Spanish Laws, and of the Civil Code,
which relate to the title of LAS SIETE PARTIDAS, on
frauds, &c. (*engano.*)

Digest, lib. 4, tit. 3. - - - - - *De dolo malo.*
Code, lib. 2, tit. 21. - - - - - *De dolo malo.*
Domat's Civil Law, part 1, b. 1, tit. 18, sect. 3.
Civil Code, b. 3, tit. 3, ch. 2, sect. 1, art. 16 & 17...ibid,
ch. 5, sect. 7, art. 204.

OF FRAUDS, &c. (*Engaño.*)

What is meant by frauds, and how many kinds there are, - - - - -	LAW 1
Of the difference existing between frauds, - -	2
Who may demand reparation for a fraud commit- ted ; before whom, and against whom, - - -	3
Of whom may reparation for a fraud committed, be demanded, - - - - -	4
Who they are who are bound to make reparation for a fraud committed by others, when they are benefited thereby, - - - - -	5
Within what time reparation for a fraud should be demanded, and in what manner, - - - -	6
In what manner men commit frauds upon one an- other, - - - - -	7
Of the frauds committed by retailers who mix things of inferior quality with those which they sell, (a) - - - - -	8

(a) As the remaining three laws of this title relate to the punishments
inflicted for certain frauds, without giving any remedy of a civil nature,
it was found unnecessary to translate them, or to give their heads.

TITLE XVI.

Of wicked, and of innocent frauds (engaños), and of cheats (baratadores.)

LAW 1.

What is meant by fraud (engaño); and how many kinds there are.

Dolus, in Latin, means fraud (*engaño*), in common speech; and fraud consists in the artifices which men practise upon one another, by deceitful, equivocal and false words, uttered with an intention to cheat or deceive. This species of fraud is called in Latin *dolus malus*, which means, as it were, wicked fraud. And although frauds are practised in various ways, yet they are committed chiefly in two. The first, by deceitful or artful words. The second, where one man questions another concerning any thing, and the latter fraudulently remains silent, being unwilling to answer; or if he answer, he does it in doubtful words, so that a man cannot protect himself against the fraud they conceal.

LAW 2.

Of the difference existing between frauds.

There is a difference between frauds; for there are some that are innocent, and others that are wicked. Those are innocent that are committed in good faith and with good intention, as for the purpose of catching thieves, robbers, or other persons, who do wrong or damage to the king and his subjects; or those

which are practised upon our known enemies, or upon those who are not enemies, when they endeavour to defraud us. And wicked frauds are they that are of a contrary nature to those above mentioned.

[No other part of this law in force.]

LAW 3.

Who may demand reparation for a fraud committed; before whom, and against whom.

The person who has been defrauded, or his heirs, may demand reparation therefor, by complaining before the judge of the place, and proving the fraud. We likewise say that if the fraud be committed in a sale, purchase, exchange, or in any other contract or agreement entered into among men; then he who committed it, as well as his heirs, will be bound to make reparation for the same. But if it had not been committed in any of the above mentioned or other similar contracts, but in some other way, in the commission of a crime, which has no specific name, as will be hereafter shewn; then the heirs of the defrauded will not be bound to make amends therefor, except for as much as the estate which they inherited, was increased by the fraud, and no more. We also say that if several persons conspire together to commit fraud, the person upon whom it is practised, may demand reparation of each of them. But when he shall have obtained full amends of one of them, he cannot afterwards claim any thing more of the others.

LAW 4.

Of whom may reparation for a fraud committed, be demanded.

The father or mother sometimes commit fraud upon their children, or the grandfather upon his grandchild, or the master upon his freedman. And the ancient sages have said that none of these persons can bring an action of fraud against their superiors, to obtain amends for any wrong or loss they have thus sustained, in as much as they are always bound to honour and respect them, and should not use towards them any language from which any sort of infamy might arise. We also say that reparation for fraud cannot be demanded, except for a sum exceeding two gold maravadis. (a) But if any one sustain damage, in any of the above mentioned ways, although he cannot claim amends therefor by reason of fraud, yet he may petition the judge to cause the wrongdoer to make reparation as for an injury done unintentionally, which is called in Latin *in factum*; and the judge ought to do it accordingly.

[No other part of this law in force.]

LAW 5.

Who they are that are bound to make reparation for frauds committed by others, when they are benefited by the same.

If any corporation or person derive benefit from the fraud committed by their steward or attorney in fact,

(a) See note on law 9, tit. 4, part 5, vol. 2, p. 651.

upon any other person, or the minor from that committed by his guardian, each of these will be bound to make amends for the same, to the amount of what they have profited thereby ; and moreover, they who committed the fraud, will be bound to pay the person defrauded, out of their own effects, for the damage they have caused. But as soon as the person injured shall be paid by one of the wrongdoers, he cannot afterwards demand amends of the others, as we have said in the third preceding law.

LAW 6.

Within what time reparation for a fraud, ought to be demanded, and in what manner.

He who has been defrauded, may bring suit for reparation at any time within two years from the day the fraud was committed, and for ever after that time he cannot bring his action as for a fraud, although he or his heirs may, at any time within thirty years thereafter, claim amends of the wrongdoer, for the loss which can be proved to have been sustained on that account, as well as the expenses of the suit.

[No other part of this law in force.]

LAW 7.

In what manner men commit fraud upon one another.

It is impossible to enumerate the various means by which men defraud one another ; nevertheless, we will speak of those which were mentioned by the ancient sages, in order that people may guard against them,

and judges know how to detect and punish them. And we say that a man commits a fraud, who designedly sells or pledges for gold or silver, a thing which he knows is not so; or any thing else of a certain kind, inducing the buyer to believe that it was of a better sort. So it would be, if a man exhibit genuine gold or silver, or any thing else for sale, and having agreed upon the price with the buyer, should afterwards intentionally change it, and give him that which was of an inferior quality. So a person would commit a fraud, who should designedly show to another a thing of good quality, offering to pledge it to him, and should afterwards give him some other inferior thing in its stead. So likewise a man would commit a fraud, if he pledge a thing to one man, and afterwards pledge it to another, inducing the latter to believe that it was not pledged before; or if he were silent, and should not inform him that he had already pledged it to another, in case the thing should not be worth as much as was sufficient to pay both debts; but if it should be sufficient for that purpose, then no fraud would be committed.

LAW 8.

Of the frauds committed by retailers, who mix things of inferior quality w th those that they sell.

There are merchants who endeavour to gain by fraudulent means: as where a man keeps grain, flour, wool, or other similar things for sale, in sacks or baskets, and puts other substances of the same, but of a better kind, on the tops of them, as a specimen of what

they contain, while he puts that which is of an inferior quality beneath, inducing the buyer to believe that the whole contents are like that which he sees on the top. So a man commits a fraud, when he sells wine, oil, wax, honey, or other similar thing, mixing with them other substances of an inferior quality, and makes those who purchase them, believe that they are pure and good. So jewellers are guilty of fraud, when they sell rings made of brass or silver, which are gilt, saying that they were gold; or sell counterfeited crystal or glass stones, for precious ones. (1) (a)

(1) *R l. 1, tit. 14, b. 5.—ibid ll. 1 & 2, tit. 12, b. 5.*

(a) The remaining three laws of this title, are not in force.

TITLES

Of the Roman and Spanish Laws which relate to the title
of LAS SIETE PARTIDAS on the signification of words.

Digest, lib. 50, tit. 16 - - *De verborum significatione.*

Code, lib. 6, tit. 38. - - - *De verborum et verum significatione.*

Ordenamiento de Alcalá, tit. 27.

OF THE SIGNIFICATION OF WORDS.

What is meant by signification or interpretation of words, - - - - -	LAW 1
What are the doubtful expressions or things which require explanation, and who may give it, -	2
How doubts may be explained which arise on the expressions used by the parties in litigation, or which are contained in the judgment, - - -	3
How doubts ought to be explained when they arise on the laws, or privileges, or letters of the sove- reign, - - - - -	4
How doubts ought to be interpreted, when they arise concerning the meaning of the words used by the testator in making his will, - - - -	5
Of the meaning and signification of other obscure words, - - - - -	6
Of the interpretation of other doubtful words, -	7
Of the explanation of other words, - - - -	8
Of the interpretation of doubtful words, - - -	9
Of the interpretation of other doubtful words, -	10
Of the interpretation of other doubtful words, -	11
Of doubts which arise concerning the births of children, and the deaths of men, - - - - -	12

TITLE XXXIII.

Of the signification of words, and of doubtful expressions.

LAW 1.

What is meant by the signification or interpretation of words.

By the signification or interpretation of words, is meant the explanation and definition of the thing concerning which the dispute exists ; or if it has no specific name, then its definition by other certain marks. And as the ancient sages have said that the variety of words and of doubtful things is endless, it is therefore impossible to establish any certain rules concerning every thing that may happen. We shall however speak of the general rules which are in use in that respect, and by analogy, determine upon the new cases which may take place.

LAW 2.

What are the doubtful expressions or things which require explanation, and who may give it.

Doubts may arise in the contracts or agreements which men enter into with one another. When this is the case, the judge before whom the dispute exists, ought to consider whether the agreement on which the doubt arises, be such that the contract cannot have effect, unless according to the understanding of one of the parties, and not that of the other : for then he shall construe and interpret it according to the understanding

of that party which gives effect to the contract, and not according to that of the other: as where a man, being in the kingdom of Murcia, promises to pay something at Carthagená within ten days, after which time the obligee requires him to perform his promise, and the obligor reply that he understood he was to pay at Carthagená in Africa, and not at Carthagená in Spain; in that case, the judge ought to explain the doubt, and compel him to pay in the Carthagená, nearest to the place where the contract was made. And the case here put, may serve as an example for all others of a similar nature. But if the doubt be such, that the contract can have effect according to the construction given to it by both parties, then the judge shall adopt that construction which is the most consonant with reason and truth; as where a man buys something of another person, for the price of one thousand maravádis, and the seller should say that he understood the maravádis were to be black, and the purchaser should say they were to be white; (a) if such doubt cannot be cleared up by written documents or witnesses, the judge ought to examine whether the thing sold may be worth as much as is alleged by one of the parties and no more, according to which he ought to explain the doubt and render judgment. And if he cannot avail himself of any of these means of interpretation, he ought to explain the doubt against the person who

(a) The white maravádis was a species of coin fabricated under the reign of Alphonso the wise, (*maravedi Alfonsi blanco.*) The black maravedis was of less value than the white.

expressed himself or stipulated obscurely in the contract, and in favour of the other. (1)

LAW 3.

How doubts may be explained which arise on the expressions used by the parties in litigation, or which are contained in the judgment.

If doubts arise on the meaning of the expressions used by the plaintiff in his petition, at the time the suit was instituted against the defendant, they should be interpreted in the manner they are understood by the plaintiff, and in no other way. But if issue be joined in the cause and any doubts arise upon the questions put, or if the party interrogated should not answer clearly, the judge ought to compel him to answer and express himself with certainty. And if he be unwilling to do it accordingly, then his obscure language shall be interpreted to his prejudice, and to the advantage of the other party. (a) We also say that if there should be any doubtful or obscure expressions contained in the judgment, they may be explained by him who renders it, if he be an ordinary judge. But if he be an inferior judge, then he cannot interpret his judgments, unless at the time he renders them, as we have said in the third partida of this book, in the laws which speak of that matter.

(1) *R. l. 3, tit. 1, b. 2.*

(a) *Code, art. 261, p. 310.*

LAW 4.

How doubts ought to be explained when they arise on the laws, the privileges. or letters of the sovereign.

[Not in force.] (a)

LAW 5.

How doubts ought to be interpreted, when they arise concerning the meaning of the words used by the testator, in making his will.

The words of the testator, ought to be interpreted simply, according to their customary import, and the judge shall not depart from their meaning, unless when it clearly appears that the wish of the testator was different from the apparent meaning of the words contained in the will. Wherefore the ancient sages have said that if the testator should bequeath one of his slaves, as a legacy, who bore a certain name, but should call him by another than his right name; such a legacy would be valid, although there should be a mistake as to the name, in as much as it was his intention to bequeath the slave, and as particular names are given to men that they may be known by them. Therefore if the will of the testator cannot be understood in any other manner, though there should be an error as to the name, such error shall not prevent the testator's wish from being obeyed. Yet if his wish should be repugnant to law or good morals, then it ought not to be observed, as is prescribed in the sixth partida under

(a) Abrogated by the Code, art. from 13 to 18, inclusively, p. 4 & 6.

the title of legacy, in the laws which speak of that matter. And if the testator should make use of general expressions which can be so construed as to apply to several things, he shall be understood as intending to bequeath the thing which was of the least value ; as if he should bequeath to any one, a hundred denarii, (a) or any other sum. For then we ought to presume that he intended to give a hundred denarii of the least current value in the country, unless it were the custom of the testator, or of the country, when money was spoken of, to allude to the coin of the greatest value, or unless it can be shewn, in some other way, that such was his meaning, for then his words ought to be interpreted according to their usual signification. We also say that if the testator should, by his will, bequeath all his writings (*cartas*), it shall not hence be inferred that he intended to give his books, unless he were a literary man and had no other writings than his books, and had made the legacy in favour of one who was engaged in studying the works of the sages : for in that case, he ought to be understood as intending to bequeath his books, and the legatee shall take them accordingly. We moreover say that if a man, who has many birds of different species, should bequeath them to any one, saying: "I bequeath my birds to such a one," the expression shall be so construed as that the legatee shall have the whole of them, together with their cages, leashes and coops whereby they were confined. And the ancient sages understood that by these

(a) *Denarii*, a species of coin formerly in use in Spain, of which there were pieces of different value.

words were included, not only the hunting birds and those that were confined in coops, but also the peacocks and hens, and all the young they produce, which were in the power of the testator at the time of his death. But it is not understood that the servants who attend on such birds, are included in the legacy, unless the testator had clearly and expressly said so. We also say that if the testator's wines were contained in tubs or jars, and he should say : " I give all my wine to such a one ;" he shall be understood as giving it, together with the vessels in which it is contained. So if the testator should order his heirs to furnish any one with the means of living, out of his estate, his order shall be so construed as that they shall give him what he stands in need of, for his eating, drinking, wearing apparel and shoeing, as also with the means of restoring his health when he is sick ; for all these things are necessary for the life of man.

LAW 6.

Of the meaning and signification of other obscure words.

We have often used, in the laws of this book, the following expressions : " if *such a man* do such a thing, he shall suffer such a penalty : " by these words, we intend that the prohibition shall extend to every woman, as well as man, though she should not be expressly mentioned, unless in those particular cases in which women are protected by law. We also say that by the term *city*, is understood all places surrounded by walls, together with their suburbs and buildings appertaining to them ; and that by

the term *woman*, is meant as well a female (*virgen*) above twelve years of age, as all other women whatsoever. We likewise say that by the word *family*, is understood the husband and his wife and all who live with him, over whom he exercises his authority, as children, servants and other dependants. For that is called a *family* which is composed of more than two persons subject to the will of its head, but a less number would not make a family. And he is called *father of a family* who is master of the house, though he had no children. And she is called *mother of a family* who lives virtuously in her house, or maintains a good moral character. And they are called *the servants, (domesticos)*, of a man, those who are properly such; as also labourers who cultivate his fields, as well as his freedmen. Likewise by the word *enemy*, is understood him who killed the father or mother of any one, or his relatives as far as the fourth degree, or who has brought a suit against him, in order to reduce him to slavery, or who had accused him of a crime which, if proved, would have exposed him to the loss of life or limb.

[No other part of this law in force.]

LAW 7.

Of the interpretation of other doubtful words.

And by the word *arms*, is understood not only shields, cuirasses, lances and swords, and all other weapons with which men may be wounded, but also clubs and stones. And by the word *metus* in Latin, is meant the fear of death, torture, loss of limb or liberty, or of the titles by which it may be established, or the dread

of some dishonour, followed by infamy. It is of these or other similar species of fear that we spoke in the laws of this book, when it is said that a contract or agreement entered into through fear, is not valid. For by such fears, not only timid men, but also those who are courageous, are induced to make promises, or to do other things against their wills. (1)

[No other part of this law in force.]

LAW 8.

Of the explanation of other words.

By the word port, (*puerto*), is meant a place surrounded by mountains, or on the sea-shore where ships or other vessels are loaded or unloaded; as also every place in which a ship can pass the winter season and remain at anchor; but with respect to other places where a vessel can anchor but cannot be protected from storms, they are called bays or roads (*playa o pri-elago*.) We also say that by the word *ager* in Latin, is meant in common speech, a field intended for cultivation, in which there are no houses or public buildings, except certain cabins or shelters, in order to gather the fruits. By wearing apparel (*vestimentos*), is meant all the garments which men and women are accustomed to wear daily, or when they are not engaged at labour. So also by an inheritance (*herencia*), is meant the estate, property, claims, rights and actions of the deceased, after deducting the debts he owed, and the things belonging to others found there. We also say

(1) C. art. 9, 11, 12, 13, 14 *fr.* 262.

that children who are born dead, are considered as having never been born or existed; wherefore the wills made by their fathers or mothers cannot be revoked on their account. We also say that those who are born with the forms of beasts, or out of the ordinary course of nature, are not considered as existing (*fantasmas*), or as children. Of these we have fully spoken in the title which treats of the state of man, in the fourth partida of this book. (1)

[No other part of this law in force.]

LAW 9.

Of other interpretations of doubtful words.

We say that a man buys or acquires a thing in good faith, when he believes that he who gave or sold it to him, had the right or power to do so; and that he acts in bad faith, who buys a thing belonging to another person, knowing that it was not the property of him from whom he obtained it, and that he had no power to alienate it. And so with respect to an heir who acquires the estate of another by a will or otherwise. And we call those things *our own* and as belonging to us, in which we have a right of property, or which we possess in good faith and by a just title. We also say that when a man gives to another a part of any thing, whether by will or otherwise; by such expression he is understood to give him the half of the thing mentioned, unless he had specified that he gave more

(1) C. art. 5 & 6, p. 8.

or less than the half; for then the donee would be entitled to the portion designated.

LAW 10.

Of the interpretation of other doubtful words.

To alienate, are words often made use of in the laws of this book. Wherefore we will explain their meaning; and we say that whoever is prohibited from alienating a thing, can neither sell, exchange, pledge nor encumber it with a service, nor give it on a quit rent, to any person to whom he is prohibited from alienating it. We also say that by *property* is meant the ownership of a thing, and *possession* is the act of detaining it. Yet sometimes one of these words is taken for the other; as if a man say in his will: "I bequeath to such a one *all my possessions* in such a place;" for by such bequest he is understood to give not only the possession, but also the property of them. And we also say that the word *restituere*, which means to restore, has various significations. And we say that when the judge orders a thing to be given or restored to any one, the restitution ought to be made freely and without opposition, and the person ordered to deliver it, shall restore it without deterioration, and in the same condition it was before. We also say that a *moveable thing* is that which a man may transport from one place to another, or which can move of itself; and by *merces* is meant merchandize of a moveable nature. We also say that by *cautio* in Latin, is meant the security which the debtor gives to the creditor, by furnishing some person or pledge to respond

for him. And by *creditor* in Latin, is meant he who has a right to receive a debt or other thing to which he has some legal title; and by *debtor*, he who is bound to give or to pay any debt or thing which he cannot dispense himself from doing, either legally or otherwise. And *fiador* is he who binds himself to pay a thing or debt for another person, and in whom the creditor confides. We also say that the *expenses* which men incur on account of the property of other persons, are of various kinds. For there are some that are called *necessary*, as without them the things would be deteriorated or lost. And there are some that are called *utiles*, because they augment the income of the things upon which they are expended; as where a man who is in possession of the field of another, plants trees or vines there, or makes an oven, a wine press, or barn upon another's property. And there are other expenses which are called *voluntary*, that is for pleasure, or which do not increase the revenue of the things upon which they are expended; as where a man paints a house, or makes a flower garden, or a basin of water or other similar things intended for pleasure. And we have fully shewn in the laws of this book which speak of this matter, in what cases such expenses can, or cannot be recovered. (a)

(a) See in law 43, tit. 28, part 3—ibid, in law 5, tit. 11, part 4.

LAW 11.

Of the interpretation of other doubtful words.

Dolus in Latin, means in common speech, fraud, of which we spoke fully in the title on that subject. (Part. 7, tit. 16.) And by *lata culpa* is meant a gross and manifest fault; as where a man does not understand what the rest of mankind, or the greater part of them, do understand. And this fault proceeds from gross and supine ignorance (*necedad*), which resembles fraud; as where a man receives a thing belonging to another person under his care, and leaves it in the road in the night, or at the door of his house, supposing that no other persons would take it: for if it be lost, he will be guilty of a gross fault, for which he cannot excuse himself. So it would be if a man were to believe that he could contravene the mandates of his sovereign, without incurring any punishment, or should commit any other similar offence. We also say that there is another kind of fault, called *levis*, which is, as it were, laziness or neglect. There is yet another kind, called *levissima*, which is, where a man does not use the same diligence in administering and taking care of a thing, which another man of good understanding (*buan seso*), would use, if it belonged to himself. We also say that *casus fortuitus* means in common speech, an event which happens by accident, and which could not be foreseen: such as the falling down of a house, breaking out of a fire, wrecking of a ship, the breaking in of thieves or enemies. We have fully explained when, and in what cases, the

several species of fault and forfuitous events take place, under the title of loans and deposits, in the laws which treat of that matter.

LAW 12.

Of doubts which arise concerning the birth of children and the deaths of men.

Women are sometimes delivered of two children at a birth, and doubts may arise which of them is born first: and we say that if one of them be male and the other female, the male shall be considered as having been born first, as the contrary cannot be proved. But if both of them be male, and it cannot be known which was born first, in that case both shall have the honours and the estates which the first born is entitled to, and who is called in Latin *primogenitus*. We also say that if the husband and wife die together in a ship wrecked at sea, or in a tower or house consumed by fire or which had fallen down; in that case, we consider that the woman died first, as she is naturally more feeble than the man. It is useful to know these things, on account of the donations which the husband and wife make to each other, during their lives, and the contracts and agreements they enter into concerning their dowries and *arras*. For by the death of one of them, the other sometimes gains these things, as we have said in the laws which speak of that matter. (a) We also say that if the father and his son

(a) See ll. 23 & 24, tit. 11, part 4.

who is above fourteen years of age, die in battle or at sea by shipwreck, or in any similar way, and it cannot be known which of them died first, then it shall be understood to be the father. And so with respect to the mother who dies together (*a su ora*) with her child, by any similar accident which happens to them both. But if the son be under fourteen years of age, he shall be presumed, on account of his weakness, to have died first. It is useful to know these things, in order to determine which of their relations shall have or inherit their estates, when disputes arise in that respect. (1)

(1) *R. l. 2, tit. 8, b. 5—C. art. 60, 61, 62 & 63, p. 158.*

TITLES

Of the Roman Laws which relate to the title of **LAS SIETE PARTIDAS** on the rules of law.

Digest, lib. 50, tit. 17. - - - *De regulis juris diversis.*

TITLE XXXIV. (a)

Of the rules of law.

RULE 1.

That every judge ought to favour liberty.

We say, it is a rule of law, that every judge shall favour liberty, as it is congenial to nature not only that men, but that all other animals should desire it.

RULE 2.

What is meant by slavery, and how many kinds there are.

We also say that slavery is a thing which men naturally abhor; and not only is a slave considered as in a state of slavery, but also he who has not the power to go out of the place of his residence. And the ancient sages did not consider a person as free and unimprisoned whose irons are taken off, but who is held by the hand, and closely guarded.

(a) The rules of law being expressed in very short sentences, it was deemed unnecessary to prefix an index to the title.

RULE 3.

That is not considered as property (bienes), which is the cause of greater loss than gain.

The ancient sages likewise said that things are not considered as property (*bienes*), which cause more loss than gain to a man.

RULE 4.

For what reason he who is not in his right mind, cannot obligate himself.

Likewise a man who is not in his right senses, can do no legal act; wherefore he cannot obligate himself, as he neither knows nor understands what is useful or hurtful to him.

RULE 5.

That he commits a great fault, who undertakes what he does not understand, nor is competent to perform.

But the ancient sages have said that he commits a great fault, who undertakes to do what he does not understand, or is incompetent to perform. (1)

RULE 6.

That if one man give advice to another, he will not be responsible for the damage sustained thereby, unless he had given it through fraud.

They have also said that no man is responsible to another for the advice he gives him, though damage

(1) *R. l. 6, tit. 16, b. 2.*

result therefrom, unless he had given it in fraud: for then he will be bound to pay for such damage.

RULE 7.

That the master who sees a person under his power committing evil, and does not forbid it, is presumed to consent to it.

They likewise said, that, if the master see any one doing evil whom he has the power to forbid, and does not, he is presumed to consent to, and participate in the evil. (1)

RULE 8.

That he who has the power of refusing to do a thing, may consent to do it.

And they also say, that he may refuse to do a thing, who, if he desire it, has the power to compel its execution; as where one is instituted heir under a condition which is in his power to accomplish: for if he should not wish to take the estate, he may not comply with the condition, by not doing what the testator ordered to be done. And if he should wish to accept it, by complying with the testator's order, he will inherit the estate. And he thereby shews that it is in his power to refuse or accept it.

RULE 9.

That a man is excused for what he does by the command of a person under whose power he is.

[Not in force.]

(1) C. art. 20 & 21, p. 320, 322.

RULE 10.

That he who ratifies what another did in his name, is considered as if he had done it himself.

They have also said, that, where a man ratifies what has been done in his name, it will be as valid as if he had ordered it to be done from the beginning. (1)

RULE 11.

That he who can condemn, can absolve, and vice versa.

[Not in force.]

RULE 12.

That a man cannot transfer to another a greater right than he has himself.

They also say, that no man can give to another a greater right to a thing than he has himself.

RULE 13.

What is ours cannot be transferred to another without our consent.

They have also said, that, a thing which belongs to us, cannot be transferred to another, without our consent (*palabra*) or act.

RULE 14.

That he who uses his rights, does no injury to another thereby.

The sages have also said, that, he who uses his rights, does no wrong to another thereby.

(1) R. l. 2, tit. 16, b. 5.

RULE 15.

That we can do no more than the law permits us.

They have also said that a man may do any thing which, when done, is not an evil in itself (*sin mal estança*)

RULE 16.

That a thing which a man does in the heat of passion is not valid, unless he perseveres in it.

They also said, that what a man does or says in the heat of passion, ought not to be considered as valid, unless he appear to persist in it, not having immediately repented of what he had done. But this must be so understood as that a man shall not be excused from punishment, for what he does or says in the heat of passion, to the prejudice or injury of another, though the offence would be diminished, when there was a just cause for his anger.

RULE 17.

That no man can wrongfully enrich himself to the prejudice of another.

They have also said, that, no man shall wrongfully enrich himself to the prejudice of another.

RULE 18.

That the fault of one man shall not prejudice another who did not participate in it.

They likewise say, that, the fault of one man, shall not prejudice another who did not participate in it.

RULE 19.

That the accessories and concealers of crimes, shall suffer the same punishment as those who commit them.

[Not in force.]

RULE 20.

That a man is not considered as doing a thing with bad intention, when he does it by the command of the judge whom he is bound to obey.

They have also said, that he who does any thing by the order of the judge whom he is bound to obey, is not presumed to have done it with a bad intention, in as much as the person does the injury who gave the command.

RULE 21.

That he who is the cause of an injury which happens to another, is considered as having done it himself.

They have also said, that, he who is the cause of an injury being done to another, is considered as having done it himself.

RULE 22.

That a man ought to impute to himself the damage he suffers, through his own fault.

They have also said, that a man ought to impute to himself the damage he suffers through his own fault.

RULE 23.

That he who is silent is not considered as either confessing or denying it.

They also said, that he who is silent, is not always understood to assent to what is said to him, though he should not answer; but it is nevertheless true that he does not deny what he hears.

RULE 24.

That no one can confer a benefit on another against his will.

They have also said, that one man cannot confer a benefit on another, against his will.

RULE 25.

That he is not defrauded, who knowingly consents to the fraud.

And they say, that he who permits himself to be defrauded knowingly, cannot complain of it, as of a fraud, in as much as it was not secretly committed, as he knew it.

RULE 26.

That a writing is not vitiated by what is superfluous.

And they have said, that superfluous words inserted in public acts, in order to explain certain doubts, though useless, shall not impair the acts themselves, because when they are complete they ought to be advantageous, and not prejudicial.

RULE 27.

That a privilege which appertains to the person of a man, does not pass to his heirs.

They have also said, that privileges given to any man personally, do not pass to his heirs, unless it be expressly said in the act of privilege.

RULE 28.

That privileges shall receive a liberal interpretation, according to the intention of the grantor.

[Not in force.]

RULE 29.

It is natural that he who bears the loss, should enjoy the profit.

They have also said, that according to natural reason, he who enjoys the profits of a thing, should support its burdens.

RULE 30.

That he who succeeds to another, has a just cause of ignorance.

They also said, that he who succeeds to another, has a just cause to be ignorant, whether what he demands, or is demanded of him, as heir, be right or wrong.

RULE 31.

That by the term, a good man (ome bueno), is understood the ordinary judge; and it is in this sense that these words are to be taken, when they are found in any law.

We also say that, by the words, a good man (ome bueno), is understood the ordinary judge of the place.

And therefore where it is written in any law or contract, that such a thing shall be determined at the discretion of a good man (*ome bueno*), it is understood to be the ordinary judge of the place.

RULE 32.

That a sentence which had become res judicata, is considered as the truth.

We also say that, the thing determined by a judgment from which no appeal can be taken, shall be considered as the truth.

RULE 33.

That he who is once adjudged to be guilty (malo), is always presumed to be so, unless the contrary be proved.

They have also said, that he who is once adjudged guilty (*malo*), is always presumed to be so, until the contrary be proved.

RULE 34.

That the rights of relationship which a man has towards another, cannot be extinguished by any agreement or law.

They have also said, that the rights of relationship by blood, which one man has towards another, cannot be extinguished by any agreement or law, notwithstanding the right which a man has to inherit the estate of his relations, may be lost by agreement or by law, when he gives cause for the same.

RULE 35.

That there is a difference between selling a thing, and consenting to the sale of it.

They also say, that it is one thing to sell, and another to consent to the sale, because the seller who receives the price, is bound to guarantee it, whereas it is otherwise with him who gives his consent only, (a) unless he receive the price of the thing sold; for the consent operates no further prejudice than to deprive the person consenting of his right to the thing sold.

RULE 36.

That laws are not made concerning things which rarely happen.

They also say, that laws ought not to be made, except concerning things which frequently occur. Wherefore the ancient sages avoided legislating upon cases that seldom happen; for they conceived that they could be determined by other similar cases provided for by law. (1)

RULE 37.

That in making new laws, it is necessary to consider the benefit to be derived from them, before changing the ancient laws.

[Not in force.]

(a) As when a woman consents to the sale made by her husband.

(1) *R. ll. 3 & 7, tit. 1, b. 2.*

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(b) Riepto was the accusation made by one nobleman against another. before the King, which was generally followed by a camp fight.

[b] The trial by battle has been abolished in Spain from many centuries

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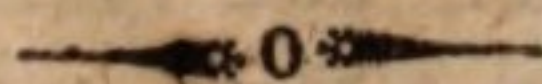
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...Y...

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ERRATA. (a)

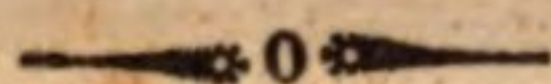
Preface ; Page 13. line 9. For eighty, read eighty three.

Ibid. Page 18. line 12. For commercial, read Canonical.

Translation ; vol. 1. Page 13. Law 5, line 12. For the empire, read the Rights of Sovereignty.

Ibid. vol. I. Page 65- Law 1, line 17. For filed, read transcribed.

Index ; vol. I. Page 604, opposite title 28, For commission' read Dominion.



ERRATA IN THE INDEX.

Words.	Lines.	For.	Read.	Words.	Lines.	For.	Read.
Alienation ;	5.	1030,	1080.	Ibid.	5.	628,	620.
Ascendants ;	2.	1598,	1098.	Ibid.	9.	769,	779.
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Debts ;	1.	381,	386.	Expences ;	7.	529,	579.

For unworthy to be heir, read unworthiness of heir.

a. The translators have not attempted to correct the typographical errors that have occurred in printing this work, as they may be easily perceived and supplied by the reader.

Moreau Lislet, Louis

The laws of las siete Partidas which are still in force in the state of
Lousiana

Bd.: 2

New Orleans (1820)

J.rel. 1806-2

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